JD–21–06
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

POWER SERVICES COMPANY

and

LOCAL 94, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL—CIO — Cases 4—CA—32939, 4—CA—33415

and

NORTH AMERICAN ENERGY SERVICES,

Party in Interest

Peter C. Verrochi, Esq., for the General Counsel.
James W. Bucking, Esq. and *Christopher J. Powell, Esq.,* of Boston, Massachusetts, for the Respondent.
Paul A. Montalbano, Esq., of Kenilworth, New Jersey, for the Charging Party.
Steven R. Paisner, Esq. and *Robert Litvin, Esq.,* of Bala Cynwyd, Pennsylvania, for the Party in Interest.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on August 2 through 5 and November 8 and 9, 2005. The original charge was filed March 26, 2004,[1] and a second charge was filed October 4. The second charge was amended November 29. A complaint issued July 23, and was corrected on July 26. An amended complaint issued July 30. On May 10, 2005, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing. This was amended on July 12, 2005.

The consolidated complaint, as amended, alleges that during the course of bargaining with the Union for an initial collective-bargaining agreement, on March 12, 2004, Power

[1] All dates are 2004, unless otherwise indicated.

Services Company (the Company) unilaterally reduced its Incentive Bonus Plan payout to bargaining unit employees for the year 2003. It is alleged that this action violated Section 8(a)(3), (5), and (1) of the Act. It is further alleged that on September 12, 2004, the Company unilaterally implemented a comprehensive bargaining proposal that changed a wide variety of terms and conditions of employment for members of the bargaining unit. This is alleged to have violated Section 8(a)(5) and (1) of the Act. In addition, the General Counsel alleges that, on January 31, 2005, North American Energy Services (the Party in Interest) became a successor employer of the bargaining unit members and became liable to remedy the unfair labor practices of its predecessor. The Company and the Party in Interest filed answers denying the material allegations of the amended consolidated complaint.

As described in detail in the decision that follows, I conclude that the General Counsel has demonstrated that the bargaining unit members engaged in protected union activities and that the Company was aware of their participation in those activities. The Company's unilateral reduction of the Incentive Bonus Plan payout constituted an adverse action taken against the bargaining unit members. I further find that the General Counsel has not met his burden of demonstrating that unlawful animus formed a substantial and material part of the motivation for this adverse action. As a result, I have determined that the Company did not violate Section 8(a)(3) and (1) of the Act by unilaterally reducing the incentive payout. As will be discussed, the remaining allegations against the Company are entirely derivative of the General Counsel's contention that the unilateral incentive payout reduction constituted a violation of Section 8(a)(3) and (1) of the Act. In finding that this unilateral action did not violate these provisions of the Act, it follows that no derivative violation of Section 8(a)(5) and (1) of the Act has been established. Finally, as the Company did not violate the Act in any of the ways alleged in the amended consolidated complaint, the Party in Interest is not liable to remedy any of the alleged unfair labor practices.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Party in Interest, I make the following

Findings of Fact

I. Jurisdiction

The Company, a California partnership, engages in the operation of an electricity generating station at its facility in Carneys Point, New Jersey, where it annually receives gross revenues in excess of $250,000 and purchases and receives at the Carneys Point facility goods and services valued in excess of $50,000 directly from points outside the States of California and New Jersey. The Company admits[3] and I find that it is an employer engaged in commerce

---

[2] There are a number of errors in the transcript of these proceedings. Many of these were discussed and corrected at the beginning of the second week of trial. (Tr. 931-967.) Counsel for the General Counsel also filed a motion to correct transcript. This is unopposed and I grant it with the following minor exceptions and additions. His citation to p. 29, l. 12 should be to p. 29, l. 16. At p. 35, l. 7 and p. 347, l. 16, I agree that my words are garbled. I cannot recall what I actually said. At p. 425, l. 1-2, the transcript is garbled, but I cannot recall the actual testimony. Counsel's citation to p. 830, l. 12 should be to p. 830, l. 15. At p. 1009, l. 20, the word "hype" should be "pipe." While I am certain that there are some remaining errors, they are not significant or material.

[3] See the Company's stipulation at trial (Tr. 7) and its answer to the consolidated complaint,

Continued

within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Party in Interest, a Washington corporation, has provided power plant operations and maintenance and support services at the Carneys Point facility since January 31, 2005. It annually receives gross revenues in excess of $250,000 and provides services valued in excess of $50,000 outside the State of Washington. The Party in Interest admits[4] that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Background

Because it forms the context for many crucial issues of motivation in this case, it is necessary to examine the Company's history and operating philosophy. During the events at issue, Chris Iribe was the chief operating officer. He testified that he and Joe Carney created the Company in 1989, acquiring both its assets and its contracts.[5] It was based on an innovative concept, the establishment of large unregulated power plants that would sell their product on the open market.[6] This contrasted with the usual situation in the power generating industry, operation of highly regulated facilities that possessed long-term contracts with purchasers of electricity.[7] Over the following years, the Company underwent a series of business transformations, perhaps reflective of difficult market conditions.[8]

Among the Company's facilities is a power generating plant constructed at Carneys Point, New Jersey. It produces electricity by burning coal in a steam turbine process. The plant employs approximately 60 persons, of whom less than 40 are members of the bargaining unit at issue in this case.

The Company's management style and philosophy arose from the nature of the organization. The business plan called for the operation of large generating plants staffed by relatively few production employees. In order to make this work, the Company relied on the creation of a highly flexible work environment that permitted it to freely deploy its staff without restrictions as to job descriptions, seniority, and the like. As Iribe described it

> The company's approach to the employees was that they were all members of a very large team, as well as, small teams at each of

---

pars. 2 and 3. (GC Exh. 1(t).)

[4] See the Party in Interest's answer to the amended consolidated complaint, pars. 2 and 3. (GC Exh. 1(x).)

[5] Carney died in 1997. In the following year, Iribe became the sole chief executive in charge of power plant operations.

[6] The Board has taken note of the general context of deregulation in this industry which it has characterized as "the rapid evolution of the electrical power industry," observing that this process has placed "enormous pressures" on labor relations. As a result, "[f]or the institution of collective bargaining to succeed under these conditions, the process must be flexible." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001).

[7] Iribe testified that this innovative concept proved to be less than successful because it involved "construction of all these assets that didn't necessarily have markets." (Tr. 428.)

[8] Some of this tangled history is set forth in a stipulation. (Tr. 49-52.)

> their facilities, and our approach was to treat them as team members all the way up and down the line.

(Tr. 430.) In order to achieve this type of flexible team orientation, the Company structured its compensation for operating employees in a manner designed to heavily reward performance. In the first instance, the Company maintained a performance wage system. In January of each year, management implemented an annual wage increase. This was not applied evenly across the board. Instead, the overall amount was divided among the employees by reference to assessment of their perceived individual job performances.

Beyond the use of performance criteria in granting annual wage increases, management created and maintained a substantial incentive plan. In their testimony, most witnesses simply referred to this as a "bonus." For simplicity's sake, I will adopt this term to refer to the plan. The plan's purpose is explained in the Company's handbook:

> [The Company] places a significant emphasis on incentive/ variable pay as a means of rewarding outstanding employee, team and Company performance. Regular full-time and part-time employees are eligible for variable incentive pay. The amount of variable pay earned will vary from year to year, depending on the Company's overall financial and strategic results, individual and team accomplishments and managerial discretion.

[Handbook at p. 47, GC Exh. 110.]

Each calendar year, management would develop the metrics used to calculate the bonus. This was done early in the year, but adjustments would be made throughout the year to account for unexpected developments. The plan would include target goals and stretch goals, the former to measure expected performance and the latter to reward unexpectedly good performance. If the work force met the target goals, the overall bonus amount would be 15 percent of regular compensation, including overtime pay. If the work force met the stretch goals, the bonus could increase to a level as high as 30 percent of overall compensation. Beyond this, the plan contained yet another individualized component. Once the overall bonus percentage was calculated, each employee's payout was fixed based on a plus or minus factor of up to 5 percent. The bonus was typically paid in March or April of the succeeding year. It is noteworthy that the bonus plan regularly resulted in a large measure of additional compensation for the members of the work force. During the period from 1996 through 2004, employees at Carneys Point received bonus payments ranging from 13.70 to 29.50 percent of overall compensation. (GC Exh. 99.)

The three top company officials who testified in this case were unanimous in their assessment of the fundamental value and importance of the bonus in achieving success under their business plan. Steven DiCarlo, the general manager at Carneys Point, testified that the purpose of the bonus is to obtain "ultimate flexibility" from the work force. As he put it,

> I mean, it comes down to management folks and hourly folks working together, side by side . . . ultimate flexibility in getting done what needs to be done, sort of the I'll do anything attitude, you know, and that's why it's there.

(Tr. 1238.) Frederic Barall, the director of labor relations during the events under consideration, observed that the bonus was "really designed by the Company to promote a team type of environment" that would lead to a mindset that everyone "would do what it takes to meet the

needs of the business." (Tr. 171.)

Most impressive was the rather passionate assertion of then CEO Iribe, who reported that,

> [w]e felt it was very, very necessary and we made it a hallmark of our company, all the way up and down the line from 1989 onward.

(Tr. 432.) He also noted that "[e]very employee participated in exactly the same plan."[9] (Tr. 432.)

In 1997, the Union engaged in an organizing campaign at Carneys Point. This culminated in an election. The majority of employees voted against representation. In the following year, the Company acquired a number of facilities in New England. Operating employees in these facilities were already represented by various labor organizations, including the International Brotherhood of Electrical Workers (IBEW). Iribe testified that these operations were constrained by a "whole bunch of rules" contained in their preexisting collective-bargaining agreements. (Tr. 454.) Negotiations resulted in, "a lot of positive changes to the contract that they'd had, and in exchange we offered and agreed to an incentive pay plan." (Tr. 454.) This plan included bonus targets that were exactly half of those contained in the plan for unrepresented employees. In other words, bargaining unit members had target goals of 7.5 percent with a stretch goal of up to 15 percent.

As of the turn of the new century, the Company had both union and nonunion facilities. Virtually every facility participated in the bonus plan. Unrepresented employees had target bonuses of 15 percent and stretch bonuses of up to 30 percent. Employees represented by a union had target bonuses of 7.5 percent and stretch bonuses of up to 15 percent. In September 2001, formerly unrepresented employees at the Company's facility in Cedar Bay, Florida, elected to become represented by Teamsters Local 947. After extensive bargaining, the Company and the Teamsters achieved a collective-bargaining agreement that included a bonus plan consistent with the Company's other plans for represented employees. In the following year, contract negotiations with the New England unions also resulted in new agreements that continued to include this type of bonus plan. Thus, the evidence supports the testimony of the Company's officials who contended that the 7.5-15 percent bonus plan was the Company's "template" for operations involving represented employees. (Tr. 434, 1190.)

Toward the end of 2002, management concluded that it was necessary to conduct a layoff of employees at Carneys Point. One of the employees selected for layoff was Bill Parker. Sadly, 2 months later Parker died of a heart attack. This became a "big issue" among the remaining employees at the facility. (Tr. 384.) In the springtime of the following year, the Union conducted another organizing drive at Carneys Point. It filed an election petition on April 4, 2003. The election was held on May 16, 2003, and the Regional Director certified results indicating a vote of 19 in favor of representation and 17 opposed. (GC Exh. 3.) In consequence, the Union was certified as the bargaining unit representative on May 28 of that year. (GC Exh. 4.)

The heart of the General Counsel's case against the Company involves the assertion that direct evidence of unlawful animus exists as manifested in statements made by a high

[9] Iribe reported that there was one minor exception, involving certain pipeline employees whose situation was unique.

company official during the weeks leading up to the representation election. This allegation is hotly contested and it is appropriate to turn now to a discussion and resolution of this key issue.

B. The Allegations Against DiCarlo

The General Counsel's direct evidence of unlawful animus on the part of the Company's management is entirely the product of one witness' testimony. That witness was William Talbot, the facility's operations manager until his discharge on July 1, 2003. Talbot testified that on three occasions during the organizing campaign, his supervisor, DiCarlo, made statements indicating an intention to punish the employees for their support of the Union. Each of the alleged statements was reportedly made during private conversations between the two men. DiCarlo testified that he did not make any of the statements or any other statements manifesting a desire to retaliate against employees for their protected activities.

Given the stark conflict between the accounts of the two men, it is necessary to examine their relationship before, during, and after the organizing campaign.[10] That relationship began while Talbot served as operations manager at Carneys Point and DiCarlo held the same position at the Company's neighboring facility located at Logan, New Jersey. DiCarlo testified that while the two men served in these roles, in 2001, he was directed to lead an assessment team charged with evaluation of the Company's facilities. As part of the process, the team asked operations managers to answer questionnaires about each plant's operations. Talbot was the only operations manager who declined to participate. At a meeting between the two men, DiCarlo told Talbot that he was "disappointed you wouldn't support me in this task." (Tr. 1198.) Subsequently, DiCarlo was promoted to the position of general manager at Logan.

Early the following year, the general manager at Carneys Point retired. Talbot applied for promotion to the position. Instead of promoting Talbot, the Company transferred DiCarlo from his newly acquired role as general manager at Logan to the same job at Carneys Point.[11] He testified that he was informed that he would have to resolve "a lot of management issues" at Carneys Point stemming from an environment characterized by poor teamwork.[12] (Tr. 1199.)

---

[10] Much of this context was provided by DiCarlo's uncontroverted description of the relationship. In his brief, counsel for the General Counsel observes that, "as DiCarlo provided his testimony on the last day of hearing, Talbot had no opportunity to rebut it or comment on it." (GC Br., pp. 12-13.) I disagree. Talbot obeyed his subpoena to appear and provide direct testimony for the General Counsel. There is nothing to indicate that his cooperation had ended. After the Respondents rested, I offered both counsel for the General Counsel and counsel for the Charging Party the opportunity to present rebuttal testimony. (Tr. 1326, 1341.) Neither requested that Talbot be recalled. Beyond this, I strongly reject counsel for the General Counsel's additional claim that counsel for the Company's failure to cross-examine Talbot about the wider context of his relationship with DiCarlo rendered it "impossible for Talbot's account of these alleged incidents to be heard." (GC Br., p. 48.) Counsel for the Company was certainly under no obligation to amplify the scope of Talbot's testimony.

[11] Talbot's testimony about this was disingenuous. Counsel for the Company asked him whether he considered himself the correct person for elevation to the position. He replied, "No, I don't think that would be a correct statement." (Tr. 77.) Counsel then asked whether this meant that he did not really want the job. He responded, "I did apply for it to explore the process." (Tr. 77.) As counsel for the Company put it, "[r]ather than admit what was obvious, that he was disappointed as any reasonable person would be, [Talbot] chose to deny the truth." (R. Br., p. 139.)

[12] An interesting glimpse into the situation at the facility as of this time was provided in the

Continued

In September, management at Carneys Point was directed to conduct a layoff. It will be recalled that this layoff occasioned considerable unrest among the work force, particularly after the untimely death of an employee who had been laid off. DiCarlo reported that Talbot's conduct during this process aroused his concern. He provided uncontroverted testimony that Talbot violated an order to transfer the least senior employee, selecting a more senior worker for the transfer. When confronted, he admitted his error. DiCarlo testified that the facility's human resources manager told him that she believed that Talbot's action had been the product of intentional favoritism toward an employee he liked.

DiCarlo testified that, early in 2003, another problem involving Talbot's management style came to his attention. An employee came to him complaining that he was being deprived of the opportunity to earn extra compensation available to those who were licensed to run the locomotive. DiCarlo again provided uncontroverted testimony that Talbot explained his failure to offer the employee this opportunity was due to his concern about the man's obesity and general health. DiCarlo opined that this made no sense to him since the employee in question routinely performed chores that were more dangerous than operation of the locomotive. Furthermore, DiCarlo received another complaint from an employee who claimed that Talbot had penalized that employee for his own failure to review certain reports. Based on these interactions, DiCarlo concluded that Talbot was a "manipulator."[13] (Tr. 1213.)

Because he was worried about Talbot's conduct, DiCarlo reported that he instructed Talbot to "stay away" from any discussion of the issue of union representation. (Tr. 1214.) He contended that he issued this instruction because of his concern about Talbot's manipulative behavior and because he had concluded that Talbot "was actually the guy that the employees were saying was the person that they were having the most trouble with." (Tr. 1214.) Significantly, Talbot confirmed much of this portion of DiCarlo's account. He testified that DiCarlo did tell him "not to speak with the employees about any issues that pertained to the union organizing campaign."[14] (Tr. 80.) Beyond this, Talbot also confirmed that DiCarlo told him that, with reference to the attitude of the work force, "there was a lot of emotion around me." (Tr. 117.) While DiCarlo did not provide him with any specifics, Talbot testified that he was aware that at least two employees were "disgruntled with my management style." (Tr. 120.)

Although Talbot agrees that DiCarlo had told him that he was a focus of negative attention during the organizing campaign, he contends that DiCarlo chose to unburden himself to Talbot regarding some highly controversial opinions about the manner in which management should respond to the campaign.[15] Talbot testified that sometime after the representation petition was filed, he had a discussion with DiCarlo in DiCarlo's office. He contended that

---

Union's bargaining notes. The notes for the second session, held in June 2003, include a comment by an employee-member of the Union's negotiating team, Mike Roberts. Roberts is quoted as explaining that, "[p]rior to Steve [DiCarlo] it was an intimidating atmosphere . . . Steve has the ability to change things with his parameters and he has done things when he can." (GC Exh. 6, p. 4.)

[13] By contrast, Talbot testified that the two men "had a very good relationship" and were friends. (Tr. 61.)

[14] Talbot also testified that he was not brought into any management strategy sessions regarding the response to the organizing campaign. This is consistent with DiCarlo's testimony concerning his opinion about Talbot's participation in that response.

[15] More logically, DiCarlo testified that he never discussed the Union's organizing drive with Talbot because he "had a lot of concerns about Bill" and did not trust him. (Tr. 1214.)

DiCarlo told him that,

> he was going to give the employees the biggest pile of C-R-A-P that he could and they could take it back to their union brothers and hopefully they would be on a picket line so that he could hire replacements.

(Tr. 70.) DiCarlo denied any such conversation.

On another occasion, Talbot claims that DiCarlo raised the issue of complying with a request by the fuel handling employees who were seeking their own dedicated supervisor. He told Talbot that,

> depending on the outcome of the election we were either going to hire a supervisor that they would like or a supervisor that they wouldn't be too happy with, based upon how they voted.

(Tr. 71.) DiCarlo testified that he did discuss the fuel handler supervisory position with Talbot, but without expressing any intention to punish employees for their support of the Union. Instead, he contended that he told Talbot that he did not want to take any action on this issue that would cause friction with the Union.

Talbot recounted one other conversation with DiCarlo during which he claims that DiCarlo made statements that go to the essence of this case. He indicated that in late April or early May 2003, he and DiCarlo had eaten lunch at a local establishment, the Riverside Inn. After the meal, they conversed in the parking lot. Talbot says that DiCarlo told him that,

> the union boys, they have to be made to feel the pain, that I'm going to recommend to Mr. Iribe that the bonus be taken away or at the very least reduced to make them feel the pain.

(Tr. 63—64.) DiCarlo testified that he may have eaten at the restaurant in the company of Talbot and others during this time period. He specifically denied ever having made the statement attributed to him, either to Talbot or to anyone else. He further denied having ever recommended elimination or reduction of the bonus to Iribe.[16]

Given that this is clearly the most important conversation in the entire case, it is reasonable to expect that Talbot's testimony about it would be clear and consistent. On direct examination, it appeared to be so. Cross-examination, however, was an entirely different matter. Counsel for the Company focused on the question of verb tense. He asked Talbot to explain whether DiCarlo told him that he was going to recommend to Iribe that the bonus be reduced or eliminated or whether DiCarlo had reported that he had already discussed the matter with Iribe and had actually made such a recommendation. Talbot's response was precise, "[h]e did indicate that in the conversation, indicating he was going to recommend, not that he did." (Tr. 84.) Counsel pressed the point, asking if Talbot was "sure" that DiCarlo spoke in terms of a future suggestion to Iribe. (Tr. 85.) Talbot said he was "[p]ositive" that this was so. (Tr. 85.) Counsel persisted in offering Talbot a further opportunity to make any change to his choice of verb tense, engaging in the following exchange:

[16] Iribe testified that DiCarlo never made such a suggestion to him.

> COUNSEL: And has it been your consistent recollection for the last 28, 30 months, however long it's been, that that's what Mr. DiCarlo said?
>
> TALBOT: Yes.
>
> COUNSEL: And so there's no time when you would have recalled the conversation to be that Mr. DiCarlo told you that he had already had a conversation with Mr. Iribe?
>
> TALBOT: No. The conversation was that he was going to recommend.

(Tr. 85.)

While this seemed quite straightforward, it turned out to have been anything but. On further cross-examination, Talbot agreed that he had been deposed on June 8, 2005, less than 2 months prior to his testimony.[17] In that deposition, Talbot testified that, during the conversation at the Riverside Inn's parking lot,

> [a]fter a general discussion about the union organizing campaign Mr. DiCarlo alluded to a comment or a statement or maybe a discussion he had had with Chris Iribe . . . .

(R. Exh. 1, p. 2.) Thus, as to DiCarlo's alleged key assertion of animus regarding the precise issue at the heart of this trial, Talbot had, within the space of less than 60 days, changed a vital portion of his account. He converted his claim from one that DiCarlo told him that he had talked to Iribe about use of the bonus for retaliation to one that he was going to make such a recommendation to Iribe at some future time.

The tale grows more confusing. Approximately a year before his trial testimony, Talbot had given an affidavit to the General Counsel's investigator. In his report regarding the restaurant parking lot discussion with DiCarlo, he describes something at variance with portions of both of his more recent versions. His affidavit states that DiCarlo:

> made the comment to me in the parking lot of the Riverside Inn that, ["]the boys have got to feel the pain. If they decide to elect the union to represent them, I'm going to recommend to Chris Iribe that we negotiate . . . take as tough a stance as we can, that they have got to feel the pain. This has got to stop here.["] Those were his exact words.[18]

(Tr. 90.) This clearly indicates that DiCarlo spoke of his intent to have a future conversation with Iribe. In that sense, it is consistent with his trial testimony and inconsistent with his deposition testimony. On the other hand, it indicates that the subject of DiCarlo's threatened future

---

[17] Talbot's deposition was taken during the course of his own litigation against the Company arising out of his termination.

[18] As noted by counsel for the General Counsel in his motion to correct transcript, this important piece of testimony is garbled in the transcript. The wording that I quote comes from counsel's unopposed motion which sets forth the actual language contained in the affidavit. (GC Motion to Correct Transcript, p. 2.)

conversation with Iribe would be a generalized strategy to make the employees feel pain, not a specific recommendation to target the bonus. Indeed, Talbot agreed with counsel that the quoted language referred to DiCarlo's general statement that he was "going to recommend to Chris Iribe that the company take a tough negotiating stance."[19] (Tr. 91.)

Later in Talbot's affidavit to the Board, he is asked whether DiCarlo discussed the bonus issue in his presence. He responded, "[w]ell, he recommended to Chris that he either greatly reduce it or take it away." (Tr. 92.) This time, the response which is framed in the past tense is consistent with the deposition and inconsistent with the trial testimony.

Counsel for the Company's examination of Talbot regarding his prior statements also raised another troubling discrepancy. At trial, Talbot testified regarding three discrete conversations in which DiCarlo made statements indicative of unlawful animus against the employees' organizing activities. However, after referring to the restaurant parking lot discussion, counsel posed the following question to Talbot:

> COUNSEL: Would you agree with me that when you were deposed two months ago you did not remember any of the other conversations that you testified to today?
>
> TALBOT: That would be correct.[20]

(Tr. 86.)

It is apparent that Talbot's allegation that DiCarlo thrice expressed sentiments clearly indicative of unlawful animus is both uncorroborated in any manner and replete with troubling inconsistencies and variations. Beyond this, it is important to continue the tale regarding the antagonistic relationship between the two men since the culmination of that conflict sheds significant light on Talbot's motivation.

Shortly after the representation election, DiCarlo conducted a management meeting at which he raised the possibility that he would transfer a supervisor, Jim Apostolico, to another shift. His reasoning for this move was that Apostolico was a highly effective manager whose skills were needed to address certain problems on that shift. Talbot raised strong objections to DiCarlo's proposal, warning that it could prompt Apostolico to resign. DiCarlo testified that Talbot's attitude caused him to worry that Talbot would "try to manipulate" the situation. (Tr. 1229.) In order to forestall this possibility, he instructed all of the managers to treat the subject as confidential. As he put it, he told them that, "I didn't want any of it talked about." (Tr. 1229.)

---

[19] During Talbot's cross-examination, counsel for the General Counsel and counsel for the Charging Party raised objections suggesting that portions of Talbot's prior statements were being cited selectively. Nevertheless, I note that both lawyers had been shown the deposition and, of course, counsel for the General Counsel possessed the original affidavit. Neither lawyer sought to admit any additional portions of either document. Given this, coupled with the General Counsel's opportunity to take redirect testimony from Talbot, I did not find any impropriety in counsel for the Company's use of selected portions of the prior statements.

[20] On redirect, Talbot claimed that his examination at the deposition later refreshed his memory about his conversation with DiCarlo regarding the fuel handling supervisor. He never provided an explanation as to his recollective process regarding his third allegation, the alleged comment by DiCarlo expressing an intention to force the Union to go on strike so that the Company could hire replacement workers.

DiCarlo testified that, after this meeting, he telephoned Apostolico over the weekend and discussed the proposed transfer with him. At work the following Monday, June 16, 2003, DiCarlo received an e-mail from another manager indicating that "the rumor is out that Jim [Apostolico] may be moving shifts." (Tr. 1315.) DiCarlo met with Apostolico and asked him if anyone had spoken to him about the move. Apostolico told him that Talbot had talked to him about DiCarlo's plan, adding, "listen, I'm not in favor of this, and I'm going to bat for you, Jim." (Tr. 1230.)

Upon hearing Apostolico's account of his discussion with Talbot, DiCarlo called Talbot to a meeting. DiCarlo testified that he asked Talbot, "[d]id you have a conversation about moving Jim Apostolico to a different shift with Jim[?]" (Tr. 1231.) Talbot twice denied it. DiCarlo summoned Apostolico and asked him to repeat what he had earlier stated. Apostolico did so, including Talbot's promise to go to bat for him. DiCarlo then excused Apostolico and placed Talbot on administrative leave. He testified that he took this action because,

> first of all, he lied. And second of all, he was undermining my authority by telling Jim that, you know, listen I'm going to bat for you.

(Tr. 1232.) On July 1, 2003, the Company terminated Talbot's employment.

Talbot described these events in his own testimony. His description was both disingenuous and evasive. Counsel for the Company asked him whether DiCarlo had "asked you whether you had spoken with Mr. Apostolico about the [transfer]." (Tr. 102.) Talbot responded that, "[t]hat was not the question that Mr. DiCarlo posed to me." (Tr. 102.) Talbot continued,

> [h]is exact words were, "did you tell Jim Apostolico about the plan to change his shift and not to worry about, I'll protect you from Steve [DiCarlo]."

(Tr. 102.) Talbot reported that his response to this two-part question was,

> [n]o, I did not tell [Apostolico] about the plan to change his shift nor did I tell him not to worry about it, I'll protect you from Steve.

(Tr. 102.) Counsel continued his cross-examination:

> COUNSEL: And you didn't tell Mr. DiCarlo that you had spoken with Mr. Apostolico at that point; correct?
>
> TALBOT: Nope, he didn't ask that question.

Tr. 103.) Shortly thereafter, the discussion of Talbot's position regarding this event continued with Talbot's description of DiCarlo's explanation of the controversy:

> TALBOT: [DiCarlo] claimed that he asked me if I had a conversation but in fact he asked me if I told Jim Apostolico about the plan to change his shift.
>
> COUNSEL: And so your position in the case is that Mr. DiCarlo is incorrectly

> accusing you of dishonesty because the question he asked you initially was limited to whether you told him[,] not to whether there was a discussion, and had he asked you that specific question presumably you would have answered it honestly?
>
> TALBOT: Yes.

(Tr. 104.)

Later in the course of the trial, DiCarlo was asked to comment on Talbot's view of these events. He responded that,

> [i]t's ridiculous to think that a person who is in that position is going to, you know, have as his defense that I didn't ask him specifically the right question, you know, it's like playing Bill Clinton, you know, I mean it's ridiculous.

(Tr. 1233—1234.) Without endorsing DiCarlo's rather colorful historical allusion, I agree with his fundamental point. Talbot attempts to excuse his conduct by drawing a highly artificial technical distinction that ignores the substance of the obligation he owed to his superior official. Comparing the accounts of the two men, I conclude that Talbot had breached his duty to his supervisor in three respects: by violating his instructions regarding confidentiality, undermining his authority toward Apostolico, and evading his responsibility to provide meaningful disclosure of his conduct.[21]

On July 1, 2003, the Company terminated Talbot. Talbot freely admitted that he held DiCarlo largely responsible for this decision. He testified that he has referred to DiCarlo as a "rat" and a "snake in the grass." (Tr. 105, 106.) In addition, Talbot has filed suit against the Company, seeking the sum of $2 million as compensation for wrongful termination. That suit remains pending.

Recently, the Board has emphasized the importance of a wide-ranging and fully articulated assessment of credibility. For example, in *Double D Construction Group,* 339 NLRB 303, 305 (2003), it held that a proper credibility determination is one that,

> considers the witness' testimony in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable interferences drawn from the record as a whole. [Citation omitted.]

After considering each of these analytical tools, I am left with the firm conviction that Talbot's account cannot be relied upon. It is fatally marked by troubling internal contradictions and

---

[21] I certainly recognize that the issues in this case do not directly include the propriety of the Company's decision to discharge Talbot. Nevertheless, matters touching on this question must be addressed as part of the crucial assessment of credibility that goes to the heart of the case before me. Talbot's skewed view of the events leading to his termination is consistent with his presentation as to the issues in this case, both small (why he applied for the job that DiCarlo eventually obtained) and large (whether DiCarlo made statements indicative of unlawful animus). Taking account of the entire course of his relationship with DiCarlo, I find Talbot's reports regarding DiCarlo to be biased and untrustworthy.

inconsistencies, including one that goes to the very essence of his claim that DiCarlo either did in fact target the employee bonus program or merely expressed an intention to make it a future subject of a scheme to persuade his superior to punish the employees for their protected activities.[22]

I have also taken note of Talbot's obvious motivation to further his own interests while inflicting damage on his adversaries.[23] His obvious dislike and disdain for the man who was placed in the position Talbot had sought and who ultimately recommended his termination is cause for skepticism regarding his account. Beyond this, Talbot had a powerful financial incentive to advance his own litigation by depicting his employer's personnel decisions as tainted by base and unlawful motivations.

In addition to the internal problems with Talbot's testimony and concern regarding his motives, I found his demeanor and presentation to be perplexing. He persisted in drawing essentially meaningless technical distinctions designed to be self-justifying. In addition, his account was presented in a rather flat, almost rote, manner. This contrasted with DiCarlo's testimony about the same issues. DiCarlo's presentation was logical, lively, and characterized by an emotional content that was consistent with the tenor of the events being discussed and their personal impact on him.[24]

Finally, in rejecting Talbot's story, I have also examined the surrounding evidence with a particular eye toward the Company's behavior at the bargaining table. While the General Counsel asserts that this behavior raises an inference of unlawful motivation, I disagree. For reasons soon to be presented, I instead conclude that the Company's actions are best explained as having formed a part of its strategy in protracted and difficult collective-bargaining negotiations. I find that the Company's strategy was not inconsistent with its duty to bargain in good faith, nor was it intended to express unlawful animus or inflict unlawful discrimination on its represented workforce. For all these reasons, I decline to find credible direct evidence of unlawful motivation in this case.

---

[22] In counsel for the General Counsel's brief, he attempts to minimize the impact of Talbot's inconsistent testimony about what DiCarlo actually said, characterizing it as a "minor discrepancy." (GC Br., fn. 14.) I cannot agree. Talbot's conflicting versions of the key event are similar to hypothetical testimony in a criminal case that the defendant confessed to either actually robbing a bank or merely planning to rob a bank. Under any standard of proof, no reasonable fact finder could place reliance on such contradictory accounts.

[23] I emphasize that this is a particularized assessment, not merely a general conclusion drawn from Talbot's status as a discharged former manager. For example, in *Bliss Clearing Niagara, Inc.,* 344 NLRB No. 26, slip op. at 11 (2005), the Board affirmed my reliance on direct evidence of animus provided by a terminated manufacturing manager. I noted that his testimony was supported by my favorable assessment of his demeanor and presentation, coupled with my evaluation of the particular circumstances of his termination, and the presence of probative circumstantial evidence that supported his account of unlawful discrimination against employees culminating in the discharge of union supporters. By contrast, I found Talbot's demeanor and presentation to be unpersuasive and the circumstances of his departure from employment to be suggestive of a powerful motive to harm his former employer. In addition, as will be discussed in detail later in this decision, I concluded that Talbot's version is unsupported by persuasive circumstantial evidence or by reasonable inferences about the Company's decision making process and motivation.

[24] In giving credit to DiCarlo, I agree with the analysis of his testimony persuasively presented by counsel for the Company in their post trial brief. (R. Br., p. 112.)

C. The Bargaining Between the Parties

Returning to the narrative account of the parties' relationship, it will be recalled that the Union was certified as the collective-bargaining representative on May 28, 2003. Entering negotiations, it was led by its president, John Gerrity.[25] Two other union officials were also regular participants in the collective bargaining, Kenneth Thoman and Charles Hassler. Both men are employed as business agents. The remainder of the Union's regular negotiators consisted of a group of five bargaining unit members, two of whom would generally attend each session. Gerrity testified that he was the spokesperson for the Union. In his absence, Thoman and Hassler were authorized to perform this function. Hassler was assigned the task of note taking during the sessions.

The Company's negotiating team was led by Barall, its director of labor relations. He was accompanied by DiCarlo, the general manager at Carneys Point, and Ron Otteni, the regional human resources manager. Barall was the spokesperson and Otteni was the assigned note taker. This group reported to a high-level steering committee that made the ultimate decisions. That committee was led by Iribe.

On June 19, 2003, Gerrity and Barall had a preliminary meeting to discuss the procedures for the upcoming negotiations. Even at this early stage, the parties staked out their respective overall negotiating stances. Gerrity advised Barall that "the union was going to be interested in seniority and rules and things like that." (Tr. 810.) Barall told Gerrity that the Company needed flexibility "to make sure we could operate competitively." (Tr. 810.) It was the clash between these visions as to the outcome of the talks that would form the dominant theme of all that was to come over the course of the parties' 36 negotiating sessions conducted from June 23, 2003, through August 9, 2004.

The first two sessions were held on June 23 and 24, 2003. The parties passed various proposals to each other. Among the Union's initial proposals was one addressing the Company's bonus program. It provided for a bonus "of between 0-30% of bonus-able earnings," and required that "specific goals, metrics and performance factors comprising the Program will be subject to negotiation." (GC Exh. 50.) In other words, the Union proposed keeping the bonus at the financial level existing in nonunion facilities while requiring that the Union be made an active participant in setting the performance standards. Gerrity testified that this proposal provoked an unfavorable reaction from Barall. Gerrity explained that,

> Fred got upset that we were putting in proposals, you know, that had a lot of words in them, that they were restricting the company's ability and especially mentioned the incentive [bonus] program, that it's a company program, we don't want the Union involved in it, we don't want them suggesting metrics.

(Tr. 286.) Gerrity reported that he responded by advising Barall, "[n]ot to get too worked up," since these were merely initial proposals. (Tr. 288.)

Barall's account of the tone and tenor of the first session and the impact it had on the Company's negotiators was similar. He characterized the Union's approach as "vehement" and "really very much in our face." (Tr. 817.) DiCarlo had the same impression. He appeared

[25] Gerrity goes by the nickname of "Chip."

particularly upset by the manner in which Gerrity began the meeting. According to DiCarlo's uncontroverted testimony, Gerrity scolded the Company's negotiators, reminding them, "let's not forget why we're here, you killed Bill."[26] (Tr. 1236.) This was an undiplomatic reference to the death of a laid off employee, a major subject of controversy during the organizing campaign. Gerrity also said, "[l]et's be clear here, this will not be Cedar Bay."[27] (Tr. 1237.)

The second session on June 24 followed the same pattern. While the parties reached a tentative agreement as to recognition of the Union, they continued to spar with each other over issues involving general philosophy. In addition, they continued to have different bargaining styles, approaches which seemed to be mutually incomprehensible. In particular, Barall emphasized that, in the words of the Union's note taker,

> We had been successful because people can move—having flexibility. This is a business and the Union is looking for restrictions to slow us down. This distracts from our ability to be competitive and flexible.

(GC Exh. 6, p. 2.) By contrast, Gerrity placed great value on the negotiation of a complex set of detailed rules and procedures that would address such employee concerns as seniority and wage progression. As he put it in his testimony, he preferred the "utility" style agreements,

> the good contracts that were established in the '40s and the '50s that had work rules and regulations that were agreed to with the companies.

(Tr. 496.)

As I have indicated, the problem went deeper than this divide over the general operating philosophy that would govern the facility's future conduct. Having carefully examined the parties' contemporaneous notes that document the course of bargaining and the testimony placing those notes in full context, I conclude that a major source of the difficulties that ensued was a clash in negotiating style and expectations. On the part of the management team, the negotiators appear to have been firmly rooted in their expectations based on the recent experience at Cedar Bay. Their deeply held "template" for the negotiations was the creation of a contract with a flexible work environment and a bonus containing target and stretch goals at 50 percent of those existing in the unrepresented plants. (Tr. 434, 1190.) By contrast, the Union's team appeared highly motivated to reach an agreement that was fundamentally different from that reached with the Teamsters at Cedar Bay. Their consistent goal was the achievement of a collective-bargaining agreement that provided a comprehensive and detailed roadmap of the work environment, one that gave the Union a major voice in key aspects of the Company's operations, including those aspects related to compensation and incentives. As will be described, the parties were never able to bridge this substantial gap in goals and expectations.

---

[26] Gerrity confirmed that he brought up the layoff of the subsequently deceased employee during the first bargaining session. (Tr. 385-386.)

[27] This was a pointed reference to the Company's position during the organizing campaign. For example, in a letter to employees, DiCarlo had told them that "[t]he Cedar Bay contract is the appropriate benchmark for Carneys Point because it is the only labor contract we have negotiated in a newly organized facility." [Underlining in the original.] (R. Exh. 54, p. 2.)

After these first two back-to-back sessions, the parties took a breather. They did not meet again until July 9, 2003. During the intervening period, both negotiating teams examined the situation and planned their strategies.[28] The three company officials who testified provided a consistent and credible account of their deliberations during this crucial period. Barall reported that he was quite shocked by the Union's approach. As he characterized it, the Union's initial bargaining positions,

> would destroy the basic program of the company in terms of our management rights, in terms of our performance [w]age program and as well as on the bonus that, really, you know, those three key elements of the company's program were all substantially imperiled by the union's proposals and also by the way they presented them at the meetings, the vehemence of this.

(Tr. 856.) As a result, Barall decided that it would be necessary to put aside the Company's original plan regarding the bonus issue. Instead of holding the bonus open until the final stages of negotiation after the issues of work environment had all been resolved, he concluded that it was, "important for us to come back and to put something on the table on the bonus right away." (Tr. 860.)

Barall testified that he concluded that the appropriate counter proposal on the bonus issue was to offer a "zero" bonus. (Tr. 860.) His intention was that this hard-line position would "inspir[e] more discussion and that the union would react to that as customarily happens in bargaining and ultimately we'd reach some meeting of the minds." (Tr. 860-861.) He described his plan to offer zero bonus as a "tactical position." (Tr. 862.)

DiCarlo's testimony corroborated Barall's account of the decision making process. He reported that Barall told him that the Union's "in-your-face approach to the first two sessions" including their proposal regarding the bonus created a situation where the parties were very far apart. (Tr. 1239.) As a result, Barall told DiCarlo that it would be necessary to "take a pretty significant position due to their significant position." (Tr. 1240.) Iribe's account was consistent with this testimony. After the first two sessions, Barall told him that "we had to bring the process back sort of onto middle ground." (Tr. 436.) As a result, the Company's labor steering committee made the decision to propose that the parties' relationship would not include any bonus plan.

Barall prepared a set of bullet points for his use at the next bargaining session. They encapsulate management's position on the bonus as follows:

> Our view, no bonus appropriate in contract, will negotiate lock in wages, benefits and work rules we think are appropriate. Not rely on a bonus plan. Still early in 2003 as far as we are concerned, no bonus for 2003 here. Don't see any reason [we] can't reach a prompt agreement, bonus would not be part of contract. Do not plan to propose a bonus, do not intend to have one. We'll bargain about wages on their own merits.

[28] Throughout this discussion, I will spend more time on analysis of the Company's thought processes since their motivation is a critical issue in the case. By contrast, the Union's behavior is relevant only to the extent that it forms a key element of the context for the allegedly unlawful actions taken by management.

(R. Exh. 61, p. 4; Tr. 875.)

The parties met for the third time on July 9, 2003. As planned, Barall informed the Union's negotiators that the Company did not propose to offer a bonus program for the future collective-bargaining agreement, nor did it plan to pay the employees a bonus for 2003. Gerrity described Barall's explanation of the Company's position:

> [B]ecause of restrictions in the Union contract, they don't see a bonus here, the bonus is built for flexibility and the Company is not going to be able to maintain its flexibility so there's no bonus for 2003 and no bonus going forward.

(Tr. 293.)

The Union's response at this meeting, as articulated by Gerrity, contained two elements. He noted that the Union's initial bonus proposals were simply, "an opening salvo." (R. Exh. 19, p. 6.) Regarding the presence of a bonus plan in an eventual collective-bargaining agreement, he modified the Union's prior position by offering to delete the requirement that the Union participate in the design of the bonus program's metrics.[29]

More significantly for purposes of this case, Gerrity articulated the Union's position regarding the payment of a bonus to bargaining unit employees for 2003. He testified that he told the Company's negotiators that,

> the 2003 bonus had nothing to do with Local 94 or the members asking to be represented, that was a promise made to the employees by the Company, for year 2003.

(Tr. 293.) He elaborated by asserting that the 2003 bonus was "part of the status quo" in the same manner as "medical [insurance] or breaks or supplying a meal or start times or anything else." (Tr. 294.) He specifically contended that the 2003 bonus was not a proper subject for the parties' ongoing bargaining, noting that the 2003 bonus,

> had nothing to do with negotiations, whatever would happen as a result of negotiations would be a different issue, but they owe the employees what they said that they had promised them.

(Tr. 294.)

It is noteworthy that there is no dispute among the witnesses regarding the positions taken by the parties on the 2003 bonus issue at this bargaining session. As Barall described it, summarizing Gerrity's expressed viewpoint, the Union asserted that the Company had "promised the employees the bonus for the year and that we had to pay it and that they were not going to talk about it." (Tr. 877.)

At this meeting on July 9, 2003, the parties staked out their respective positions regarding the payment of a bonus to bargaining unit employees for the calendar year 2003. Those positions did not change during the course of future negotiations. This fact is reflected in

[29] The Union formally offered this concession in writing at the parties' bargaining session on July 29, 2003. (GC Exh. 84(b).)

the testimony of witnesses from both sides and in the bargaining notes kept by both parties. Having carefully reviewed this evidence, I will set forth representative examples of the ongoing discussions about the bonus issue.

At a bargaining session on August 13, 2003, Barall told the Union's negotiators that he wanted to "make certain that the Union understands" that the Company was proposing that no bonus be paid for 2003. (R. Exh. 21, p. 6.) As reported in the Company's notes, Gerrity responded by observing that the 2003 bonus was part of "existing conditions. You are obligated to pay incentives based on existing conditions." (R. Exh. 21, p. 6.) He emphasized the seriousness of his point by posing a rhetorical question, "Do you want me to file a Board charge now?" (R. Exh. 21, p. 6.)

The discussion continued on August 28, 2003. Citing from the Union's notes of the session, it appears that Barall again told the negotiators that the Company was "not interested in paying a bonus this year." (GC Exh. 10, p. 16.) In a particularly clear expression of the Union's position, Gerrity responded:

> That was the condition of employment for 2003. You owe them a bonus for 2003. Negotiations are for 2004.

(GC Exh. 10, p. 16.)

Shortly thereafter, Barall addressed a letter to Gerrity in which he spelled out his view of the parties' respective contentions regarding the 2003 bonus. The letter was intended to follow up a phone conversation between the two men on September 8, 2003. Barall began by expressing concern that Gerrity appeared to believe that the Company had "eliminated the bonus plan" at the facility. (R. Exh. 2, p. 1.) He characterized this as a "misunderstanding." (R. Exh. 2, p. 1.) Barall went on to observe that the Union's current position on the overall bonus issue was that the collective-bargaining agreement should include a bonus, "structured along the lines of the current bonus plan at Carneys Point." (R. Exh. 2, p. 1.) He also noted that the Company's current position was that "the agreement should not include such a bonus plan." (R. Exh. 2, p. 1.) Barall opined that, although the parties were not in agreement,

> bargaining over compensation is still in the early stages. We have not made a final offer on compensation, and certainly have not implemented any changes. Indeed, we hope to reach an agreement with the Union, and our energies have been directed toward that end. We expect that there will be many more discussions about our respective compensation proposals in the weeks ahead.

(R. Exh. 2, p. 1.) Barall then expressed concern that the Union was refusing to bargain about the 2003 bonus. He advised Gerrity that,

> a bonus for calendar year 2003 should be part of our negotiations, and [the Company] has proposed that there be no bonus for 2003. The Company views this as a current compensation item that is appropriate for bargaining. The Union has stated that it will not bargain about a 2003 bonus, on the grounds that once the year began the bonus plan began and is thereafter frozen in place, not subject to negotiations. I have told you that the Company disagrees with the Union's position.

(R. Exh. 2, pp. 1-2.) Barall concluded the substantive portion of his letter as follows:

> [L]et me reiterate again the Company's position: the bonus plan is a proper subject for bargaining; the Company is bargaining about it and will continue to do so; the Company proposes that there be no bonus going forward; and the Company has not eliminated or otherwise changed the bonus plan.

(R. Exh. 2, p. 2.) Ironically, on the day that Barall drafted this letter, the Union filed an unfair labor practice charge alleging that the Company's behavior regarding the bonus issue constituted an unlawful unilateral change in wages, benefits, and working conditions.[30] (R. Exh. 4.)

The parties met again on the next day, September 9, 2003. The Union's notes reflect that Barall began the discussion by referring to his letter and advising Gerrity that the Company's negotiators were "ready, willing and able to talk about it." (GC Exh. 11, p. 1.) Gerrity responded by again insisting that the issue of a bonus for 2003 was not subject to bargaining because, "[y]ou owe this to them . . . . You are obligated for this calendar year. I'm not playing that game with you." (GC Exh. 11, p. 1.) The discussion continued in the same vein, with Barall saying that "[w]e are ready to bargain on bonuses for 2003," and Gerrity replying that "I'm bargaining forward, not backwards. What don't you understand?" (GC Exh. 11, p. 2.)

During the remainder of 2003, the parties continued bargaining on a variety of issues.[31] The bonus plan was not a major subject of discussion and the parties' respective positions on it did not change.

As the new year began, management was faced with the need to take action regarding payment of a bonus for 2003. Barall developed the Company's position and it was subsequently ratified at a management meeting convened for the purpose of addressing the bonus problem. Because the motivation for the Company's decision is a key aspect of this case, it is appropriate to quote Barall's testimony in some detail regarding his thought process. He reported that

> based on our repeated request to bargain about it and the union's refusal, I believed we had a right really to not pay the bonus for the whole year of 2003, dating back to January 1st, however after thinking about it, I decided that the appropriate thing to do would be to prorate the bonus as of July 9th because that was the day that we actually put it on the table with the union and that although we had a right to go back further, it really wouldn't be fair to the employees to not pay them a bonus for the whole year because it wasn't a subject that had been in bargaining until July, so for that reason we decided to inform the union that July 9th was the date we planned to prorate it.

(Tr. 896-897.)

---

[30] On November 26, 2003, the Regional Director advised the parties that no complaint would issue regarding this charge since it was found to "lack merit" because the Company had not, in fact, eliminated the 2003 bonus. (R. Exh. 6.)

[31] After the September 9th session, the parties met on September 24 and 30, October 14, 22, and 24, November 10 and 24, and December 11, 16, and 22, 2003.

The first bargaining session of 2004 was held on January 13. Union negotiator Thoman's notes succinctly capture the discussion about the 2003 bonus. He wrote that management raised the bonus issue and informed the Union that the "company position is it is not appropriate for 2003[,] we are willing to prorate it from the time we notified the Union." (R. Exh. 16, p. 2; Tr. 666.) He recorded the Union's response as, "It's either a Board charge or a lawsuit. They're entitled to it." (R. Exh. 16, p. 2; Tr. 666.) The Union's representatives accused the Company of prorating the bonus in retaliation for the employees' decision to obtain union representation. The management negotiators denied this accusation and asserted that the decision to prorate the bonus as of July 9, 2003, was based on the Union's refusal to bargain about it from that date forward.

The parties continued to meet and bargain about a variety of issues related to the completion of a collective-bargaining agreement. Such meetings were held on January 26 and 27, 2004. At the latter meeting, there was a brief discussion of the 2003 bonus. As described in the Union's notes, Gerrity again summarized the Union's position, indicating that "[y]ou told them what you were going to give. You owe it to them. In terms of a contract everything is on the table." (GC Exh. 24, p. 12.) In other words, the Union maintained its position that it would bargain about any subject except the 2003 bonus. Additional bargaining sessions were held on February 11, 26, and 27, 2004. At the meeting held on February 27, a union committee member questioned Barall about the decision to prorate the bonus as of July 9. Barall responded, "[t]hat is when we started bargaining. The Union said it wasn't to be negotiated, because it was good to the end of the year." (GC Exh. 27, p. 11.)

On March 12, 2004, the Company made a formal announcement of the bonus proration to the members of the bargaining unit. In a memorandum signed by DiCarlo, management explained that once the unit members obtained union representation, "the Incentive Plan became legally subject to negotiations." (GC Exh. 101.) DiCarlo reported that the Company had raised the topic of the 2003 bonus on July 9. At that time, "[t]he Union told the Company that it would not bargain about the year 2003 Incentive Plan." (GC Exh. 101.) The memo explained that several further attempts to bargain about the issue were unsuccessful. As a result, DiCarlo advised that, "[c]onfronted with the Union's continuing refusal to bargain regarding this subject, the Company is implementing its proposal [to prorate the bonus as of July 9]." (GC Exh. 101.)

Bargaining continued through March with sessions on March 11, 16, and 25. On the following day, the Union filed the original charge in this case, alleging that the Company had violated the Act by "unilaterally changing compensation," engaging in surface bargaining, spying on bargaining unit members, and creating a so-called "hit list." [32] (GC Exh. 1(a).)

---

[32] The Union has repeatedly accused the Company of engaging in surface bargaining. It filed such charges on March 26, August 30, October 4, and November 29. (GC Exhs. 1(a), (j), and (n); R. Exh. 13.) The Regional Director has never incorporated such a contention in any of the complaints against the Company. For example, see the Regional Director's letter of June 3, 2005. (R. Exh. 15.) I note that, in order to evaluate such a charge of surface bargaining, it is necessary to decide whether a party "is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Regency Service Carts,* 345 NLRB No. 44, slip op. at p. 2 (2005). As will be discussed later, it is significant that the General Counsel does not contend that the Company has violated Sec. 8(a)(5) of the Act by engaging in surface bargaining or any other form of misconduct in the collective bargaining process except that which flows derivatively from

Continued

The parties continued to bargain in April and May. Discussion covered a variety of open issues but also contained references to the Union's dissatisfaction with the proration decision. At the sessions of May 25 and 26, a federal mediator was brought in to assist the parties.

Although the record is not entirely clear as to the precise details, it appears that certain bargaining unit employees filed a decertification petition in June. Gerrity proposed that the parties suspend bargaining until after the results of this effort were known. By letter of June 11, Barall declined this suggestion, advising that "[t]he Company wishes to continue meeting with the Union with the intention of reaching a mutually satisfactory collective bargaining agreement." (R. Exh. 7.)

Bargaining resumed on July 14 and 23. On July 23, the Union presented what would turn out to be its last comprehensive proposal. (GC Exh. 90.) On the same day, the Regional Director filed her original complaint, alleging that the Company had violated Section 8(a)(3) of the Act when it "reduced the payout" of the 2003 bonus. (GC Exh. 1(c).) The complaint did not incorporate any of the additional allegations of surface bargaining, spying on unit members, or creating a "hit list."

A bargaining session was held on July 30. The parties returned to their familiar pattern of discussion of the overall bonus issue. Barall noted that the Company was "not interested" in a collective-bargaining agreement that contained a bonus. (GC Exh. 39, p. 11.) Thoman asked, "[w]hat would it take to get it back on the table?" (GC Exh. 39, p. 11.) According to the Union's notes, Barall replied, "When we get to the final package we will add it."[33] (GC Exh. 39, p. 11.)

The Company responded to the Union's comprehensive proposal of July 30 at the session held on August 9. It submitted what would turn out to be its last proposal, one that did not include any incentive plan. (GC Exh. 91.)

On August 26, Thoman telephoned Barall and informed him that the Union intended to cancel the two upcoming bargaining sessions. He testified as to this conversation as follows:

> I told him [Barall] that the Union would not be attending the upcoming negotiations, the two meetings that we had scheduled. That we would be pursuing the Board charges and the issues of the surface bargaining, and the bonus issue, and that we would not be attending.[34]

(Tr. 660.) He reported that Barall told him that the Company disagreed with this decision and wished that the Union would reconsider.

Barall followed up this conversation with a letter to Thoman dated August 26. In this

---

the alleged violation of Sec. 8(a)(3) and (1).

[33] There was some testimony that Barall actually said, "we will address it." In other words, the Union's notes may have used "add" as an abbreviation for "address." In my view, it is not a critical distinction. Either way, the import of Barall's response is essentially similar.

[34] In one of the areas of genuine disagreement in the testimony, Barall disputes Thoman's contention that he cited the bonus issue as well as the surface bargaining charge as reasons for discontinuing the bargaining. In light of my conclusions regarding the General Counsel's failure to prove the alleged 8(a)(3) violation, resolution of this conflict is unnecessary.

strongly worded letter, he accused the Union of "bad faith which has pervaded the bargaining process." (R. Exh. 8, p. 1.) He noted that "[t]he Union flatly and repeatedly refused to bargain about the 2003 bonus." (R. Exh. 8, p. 1.) He characterized the Union's decision to pursue a surface bargaining charge and refuse to meet with the Company as "bizarre and ironic," contending that,

> [t]here is absolutely no basis for any surface bargaining charge against the Company, but whether or not you agree with that, the filing of such a charge is no reason to stop meeting.
>
> Please make no mistake about the Company's position. We expect to meet on Monday as previously scheduled, and if the Union is not there, we will consider it a refusal to meet and bargain, and will pursue appropriate lawful avenues available to the Company.

(R. Exh. 8, pp 1-2.) The Union did not respond to this letter and did not attend any further bargaining sessions.

On September 13, Barall wrote another letter to Gerrity, asserting that it is "clear that the Union is refusing to bargain in violation of the Labor Act." (R. Exh. 10, p. 1.) He advised Gerrity that, "[c]onsequently, the Company intends to implement those portions of its last offer that lawfully may be implemented unilaterally, effective tomorrow, September 14, 2004." (R. Exh. 10, p. 1.) On that date, the Company published its decision to the bargaining unit members. DiCarlo read a statement to the unit members announcing the decision to unilaterally implement portions of its final offer, including changes to a wide range of terms and conditions of employment including wages, benefits, work schedules, seniority, and a variety of other items. The final item addressed the bonus:

> Incentive—Pursuant to its proposal of July 9, 2003, to which the Union never made a serious counterproposal, the Company no longer regards bargaining unit members as participants in its incentive bonus program ("bonus").

(GC Exh. 103, p. 3.)

Also on September 14, Gerrity responded by letter to Barall confirming the Union's decision to decline further meetings "until the Company has remedied the unfair labor practices" since bargaining would be "fruitless and would simply establish a stage for your further self-serving posturing." (GC Exh. 104.) The two men exchanged an additional set of letters, with Barall expressing regret that "the forum for dealing with differences of opinion about substantive proposals—the bargaining table—has been foreclosed by the Union's refusal to bargain." (R. Exh. 11.) Gerrity responded that the Union was ready to bargain, but only after the Company remedied its unfair labor practices, "which would then permit good faith bargaining." (GC Exh. 105.)

On October 4, the Union filed an unfair labor practice charge claiming that implementation of the Company's "last and final offer" was unlawful. (GC Exh. 1(j).) The charge also included another allegation of surface bargaining.

As of January 31, 2005, the Party in Interest assumed supervision of the bargaining unit's employees. It recognized the Union and entered into collective-bargaining negotiations with it.

On May 10, 2005, the Regional Director filed a consolidated complaint alleging that the proration of the 2003 bonus violated Section 8(a)(3) of the Act and that this unremedied unfair labor practice tainted the context for collective bargaining such that the Company's implementation of its proposal in September 2004 constituted a violation of Section 8(a)(5) of the Act. (GC Exh. 1(r).) On June 3, 2005, the Regional Director advised the Company that she had approved the Union's request to withdraw its other charges, including its surface bargaining allegations. (R. Exh. 15.)

Finally, in October 2005, the Party in Interest and the Union entered into a collective-bargaining agreement for a term extending from September 1, 2005, through December 31, 2006, with provisions for extensions.[35] (GC Exh. 111.)

III. Legal Analysis

A. The Bonus Proration as an Alleged Violation of Section 8(a)(3)

The General Counsel's primary and fundamental allegation against the Company is that, by prorating the 2003 bonus payment to bargaining unit members, it engaged in unlawful discrimination against them because they had participated in union activities. Everything turns on this point.[36] Somewhat surprisingly to me, the parties disagree on the proper standard to be employed in assessing this alleged violation of Section 8(a)(3) and (1) of the Act.

Counsel for the General Counsel argues that the violation is premised on a finding that the Company's decision to prorate the bonus was "discriminatorily motivated." (Tr. 17.) Put another way, he concedes that, if there "was no anti-union motivation, . . . then what they did was lawful." (Tr. 932.) As a consequence, the General Counsel's theory falls squarely within the parameters of the Board's *Wright Line* test for cases involving allegations of improper motivation.[37] As counsel for the General Counsel phrased it, "[t]he General Counsel's theory of the 8(a)(3) violation is controlled by the Board's analytical framework set out in *Wright Line*." (GC Br., p. 48.)

By contrast, counsel for the Company asserts that *Wright Line* does not apply to this case because of its bargaining context. As he argued,

> [i]f a party is engaging in bargaining and takes actions that are permitted under the rules of bargaining, hard bargaining positions, for example, that you can't superimpose an 8(a)(3) analysis over that behavior, that if it's permissible under 8(a)(5), it's permissible period, subject to, the only exception to that is if it's inherently destructive. That's the only exception. There is no *Wright Line* rule for bargaining conduct.

(Tr. 1253.) This contention was repeated in counsel's brief, where it is asserted that, "[i]f

---

[35] The collective-bargaining agreement includes a bonus program at up to 6 percent of pay and overtime for 2005 and up to 7 percent for 2006. (GC Exh. 111, p. 14.)

[36] To illustrate, at the very beginning of the trial, I asked counsel for the General Counsel whether this allegation was the "linchpin" of his case. (Tr. 19.) He agreed.

[37] 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983).

bargaining conduct is privileged under 8(a)(5) and 8(d), it cannot be found improper under the completely different statutory regime of 8(a)(3)." (R. Br., p. 93.)

The difficulty with counsel's argument that the General Counsel's failure to charge a bargaining violation under Section 8(a)(5) of the Act necessarily insulates an employer from liability under Section 8(a)(3) of the Act is encapsulated in his own recognition that the two sections represent two "completely different statutory regime[s]." (R. Br., p. 93.) Very recently, the Board addressed this relationship between Section 8(a)(3) and (5). In *Peerless Pump Co.,* 345 NLRB No. 20 (2005), the issue was whether alleged violations of Sections 8(a)(3) and (5) were closely related so as to avoid application of the Act's limitations period. In finding that the two charges were not closely related, the Board noted that the 8(a)(5) charges arose from "bargaining obligations to the Union" which were "distinct" from the "legal duty not to discriminate" that formed the basis for the 8(a)(3) allegations. 345 NLRB No. 20, slip op. at 4. In my view, this is the key point. While it may well be that the General Counsel has concluded that the Company has complied with its statutory obligation to bargain with the Union, this is entirely separate from its statutory duty to refrain from discriminating against its employees because of their protected activities. It is this particular form of misconduct that the General Counsel alleges. I find nothing in the Act or the precedents that precludes consideration of such an alleged violation of the duty owed to employees merely because an employer has engaged in required collective bargaining with their representative.[38]

In support of his contrary view, counsel for the Company cites the Board's decision in *Sun Transport, Inc.,* 340 NLRB 70 (2003). While I agree that *Sun Transport* has much of interest to say regarding the disposition of this case,[39] it does not support the proposition asserted by counsel. As in the present case, in *Sun Transport* the Regional Director filed a complaint alleging violation of Section 8(a)(3), but not Section 8(a)(5). The case arose out of the parties' bargaining over the issue of severance pay in the context of overall bargaining for a successor to an expired collective-bargaining agreement. The company offered its represented employees a severance package that was less generous than that accorded to its nonunion staff. Ultimately, no agreement was reached regarding this issue or a new contract. Subsequently, laid off bargaining unit members received no severance pay at all.

As the Board observed, the administrative law judge, "[a]pplying a *Wright Line* analysis," found that the company's position on severance "was motivated by its desire to retaliate against the Union for engaging in protected activity." 340 NLRB at 72. Consequently, he found a violation of Section 8(a)(3). While the Board reversed, it did not do so on the basis that the

---

[38] I do not mean to suggest that the General Counsel's decision not to claim any other bargaining violation is irrelevant. The Company's behavior certainly forms part of the essential context that must be examined in analyzing the alleged violation of Sec. 8(a)(3). For example, in *Nissan Motor Corp. in U.S.A.,* 263 NLRB 635 (1980), the Board affirmed a judge's dismissal of an 8(a)(3) charge based on lack of evidence of unlawful animus. In so doing, the Board took particular note of the absence of any 8(a)(5) allegation, citing this as an "unusual fact" supportive of the judge's ultimate conclusion. 263 NLRB 635, fn. 2. In *Nissan*, it is clear that the Board treated the allegation of unlawful discrimination as worthy of full analysis. There is no indication that it accorded any preclusive effect to the absence of any other claimed bargaining violation. Rather, this circumstance was treated as simply one piece of evidence (albeit an important one) to be considered in the otherwise routine adjudication of the 8(a)(3) claim. I have followed the same course in this case.

[39] I will address the importance of the Board's rationale in *Sun Transport* to the outcome of this case later in this decision.

judge had applied an incorrect analytical method. To the contrary, the Board noted that its reversal of the judge's decision was based on its conclusion that "the General Counsel has failed to carry his initial burden of proof under *Wright Line*." 340 NLRB at 72, fn. 10. As a result, *Sun Transport* should be read as standing for the proposition that the Board requires application of the *Wright Line* test whenever the General Counsel alleges that a bargaining position was motivated by unlawful animus. This is true regardless of whether the allegation is accompanied by a claim of other unlawful bargaining conduct within the meaning of Section 8(a)(5).

I conclude that the absence of any other alleged bargaining violation does not affect the General Counsel's right to proceed on the complaint of unlawful discrimination. Since the General Counsel does not contend that the proration of the bonus was inherently destructive of rights conferred under the Act, the Board's *Wright Line* test applies.[40] The Board has explained that *Wright Line* is "premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation."[41] *American Gardens Management Co.,* 338 NLRB 644, 645 (2002). Because evidence of unlawful motivation is a critical element of required proof as to the General Counsel's claim and *Wright Line* represents the Board's definitive test for assessment of that issue, it is necessary to apply that test to the facts of this case.

In *American Gardens Management Co.,* supra, the Board summarized the required elements that must be established by the General Counsel in order to meet his initial burden under *Wright Line:*

> First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [Citation omitted.]

338 NLRB at 645.

Turning to the application of this test, there is no serious dispute as to the first three

---

[40] The "inherently destructive" test does not require proof of motive. *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 34 (1967). I agree with the General Counsel's position that the Company's conduct does not fall within this rule. The Board has held that an employer is "privileged to grant wage increases to his unorganized employees" while engaged in collective-bargaining negotiations with represented workers and is "under no obligation under the Act to make such wage increases applicable to union members." *Empire Pacific Industries,* 257 NLRB 1425 (1981). Significantly, the Board prefaced this language with the observation that this privilege only applies, "[a]bsent an unlawful motive." 257 NLRB at 1425. See also, *B.F. Goodrich Co.,* 195 NLRB 914, 914-915 (1972).

[41] The Board's summary of the *Wright Line* test in a recent case highlights the central importance of motivation. In *Primo Electric,* 345 NLRB No. 99 (2005), it observed that, "[t]o prove a violation of Sec. 8(a)(3) under *Wright Line*, the General Counsel must first show discriminatory motive, by a preponderance of the evidence, by offering evidence that the employer was aware of the employee's protected activity and that animus against that activity motivated the employer's alleged discrimination." Slip op. at 1.

elements. The Company's bargaining unit employees engaged in protected concerted activity when a majority of them voted in favor of representation by the Union in the election held on May 16, 2003. See *Waste Management de Puerto Rico,* 339 NLRB 262 (2003), enf. 359 F.3d 36 (1st Cir. 2004) (employee's decision to vote for union representation was protected activity and employer's discharge of the employee in response violated Section 8(a)(3).) Obviously, the Company was aware of this activity by the unit members. Finally, the Board has held that the withholding of bonus payments is an adverse action in the context of allegations of unlawful discrimination.[42] *Eby-Brown Co, L.P.,* 328 NLRB 496 (1999).

The issue is truly joined on the subject of whether the General Counsel has met his initial burden by fulfilling his obligation at the remaining step of the analytical process. In determining whether the General Counsel has met his burden of demonstrating that the Company's decision to prorate the 2003 bonus was motivated to a substantial degree by unlawful animus against the bargaining unit members due to their participation in protected activities, the Board requires a wide ranging assessment of the entire record with an eye toward the drawing of appropriate inferences from the totality of the evidence presented. See *Sears, Roebuck & Co.,* 337 NLRB 443, 443 (2002), citing *Fluor Daniel, Inc.,* 304 NLRB 970 (1991), enf. 976 F.2d 744 (11th Cir. 1992). While scrutinizing the employer's conduct, both direct and circumstantial evidence are probative. Consideration must be given to such factors as any deviation from past practice, inconsistencies in the employer's behavior and explanations, disparate treatment of similarly situated employees, and proximity in time between the adverse action and the employees' union activity. *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003).

In making this analysis, I have first considered the direct evidence offered by the General Counsel in support of his contentions. In this case, that direct evidence consists entirely of the uncorroborated testimony of Talbot. He claimed that DiCarlo had thrice made statements indicative of an intention to punish the bargaining unit members for their protected activities during the organizing campaign in the spring of 2003. As discussed in detail earlier in this decision, I have examined this testimony and determined that it is not reliable evidence. I reached this conclusion based on my assessment of Talbot's demeanor and presentation, his pecuniary interests and personal hostility to DiCarlo, his inconsistent accounts as to highly material aspects of his claims, and the inherent probabilities presented by the entire factual context. Having found that Talbot's account lacks credibility, it follows that it cannot be relied upon as evidence in support of the General Counsel's claim that the Company acted with unlawful animus against the bargaining unit members. See *American, Inc.,* 342 NLRB No. 76, slip op. at 1 (2004), where the Board held that the judge had properly refused to rely on discredited testimony as evidence of discriminatory motivation. Having rejected Talbot's claims, it follows that there is no direct evidence that the employer's proration decision was motivated in whole or part by unlawful animus.[43]

---

[42] The Board has not hesitated to find that a discriminatory adverse action taken against an entire bargaining unit is of the type that is prohibited under the Act. *Condea Vista Co.,* 332 NLRB 1275 (2000), enf. denied 275 F.3d 1106 (D.C. Cir. 2002). (In declining to enforce the Board's decision, the court did not express any reservations about this aspect of the Board's rationale.) See also *W. E. Carlson Corp.,* 346 NLRB No. 43, slip op. at 3-4 (2006), and the cases cited therein.

[43] As a result, it is unnecessary to fully address the significance of Talbot's account if it were to be given credence. I do note that the antiunion statements attributed by Talbot to DiCarlo were all made no later than May 2003, a timeframe that is more than a year prior to the event at issue. No evidence, disputed or undisputed, exists as to any such statements made within the

Continued

The absence of credible direct evidence of animus does not signal the end of the inquiry. To the contrary, the Board has been very clear in requiring far more. For example, in *Tubular Corp. of America,* 337 NLRB 99 (2001), it affirmed a judge's finding of unlawful motivation based entirely on inferences drawn from the circumstantial evidence. It noted that,

> [i]t is well established that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required.

337 NLRB at 99. However, the Board has cautioned that there are clear limitations on the use of such evidence to support a finding of unlawful conduct. In *Cardinal Home Products, Inc.,* 338 NLRB 1004 (2003), it rejected a circumstantial case based on what it characterized as "little more than suspicion, surmise, and conjecture," holding that,

> [w]hile the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of circumstances must show more than a "mere suspicion" that union activity was a motivating factor in the decision.

338 NLRB at 1009.

Keeping in mind these parameters for the analysis, I will now examine each of the proffered items of circumstantial evidence and the General Counsel's proposed inferences to be drawn from them. In addition to the rejected testimony of Talbot, counsel for the General Counsel asserted that the following items established the existence of unlawful animus as the substantial motivation for the proration of the 2003 bonus:

> the absence of any rational business justification for the bonus reduction, Respondent's shifting reasons for seeking a reduction, the departure from Respondent's usual practice with respect to the bonus, . . . the threat of further union organization, and the blame for the reduction that Respondent put at the feet of the Union.

(GC Br., pp. 49-50.) I will now examine each of these arguments.

I agree with counsel for the General Counsel's view that the presence or absence of a rational and legitimate business justification for the Company's behavior is a powerful component of the analysis. Based on the totality of the credible evidence and considering the relevant legal background as an explanatory factor, I find that the Company presented compelling evidence that its behavior was at all times motivated by logical and lawful business considerations, particularly its need to formulate an appropriate response to conduct by the Union that was inconsistent with the Board's bargaining requirements.

---

intervening months. There is substantial support for the proposition that the proffered evidence is too remote to be probative. For example, see: *MECO Corp. v. NLRB,* 986 F.2d 1434, 1437 (D.C. Cir. 1993), and the numerous Board decisions cited therein. Furthermore, there is no evidence of similar sentiments having been expressed by either Barall or Iribe, the two members of the Company's management who had the largest roles in formulating the Company's labor relations policies.

To begin with, the evidence is clear that the Company's overall negotiating posture regarding the bonus issue was not mysterious or devious. To the contrary, during the election campaign, management sent clear signals as to its ultimate position. For example, in a letter on May 7, 2003, DiCarlo told the work force that the Company had "recently concluded" a collective-bargaining agreement at Cedar Bay that provided a target bonus of 7.5 percent and stretch bonus of 15 percent. He went on to note that the same bonus applied in all of the New England contracts, including those involving the IBEW. (GC Exh. 100, p. 1.) On May 13, 2003, DiCarlo sent another letter reiterating that "[i]n all of [the Company's] union agreements, the bonus is half of your existing Carneys Point bonus." (R. Exh. 56, p. 2.) These statements are consistent with the testimony of the Company's officials that they had a "template" for bonus negotiations designed to arrive at a bonus plan with 7.5 percent target and 15 percent stretch goals. (Tr. 434, 1190.) The Union was well aware of the Company's consistent past practice in seeking to apply this template through collective bargaining with its unions.

The evidence shows that the Union first raised the bonus issue. It demanded a bonus at twice the level of the Company's template and added an unprecedented requirement that it be granted a role in the establishment of the plan's metrics. Iribe testified that Barall urged him to consent to a response that consisted of a proposal for zero bonus as a means to "bring the process back sort of onto middle ground." (Tr. 436.) Similarly, Barall testified that his intention in making this initial company proposal was to "inspir[e] more discussion and that the union would react to that as customarily happens in bargaining and ultimately we'd reach some meeting of the minds." (Tr. 860-861.) Simple arithmetic supports this testimony. The Union's initial proposal was for 100 percent of the current bonus plus additional input. The Company's response was for zero bonus in both 2003 and going forward. It appears obvious that the goal was the achievement of an eventual "middle ground" that would be a bonus consistent with the Company's template. Thus, the Company's opening gambit was both entirely rational and disarmingly transparent.[44]

The Company's simple strategy was derailed by an unanticipated response from the Union. When faced with the Company's July 9 counterproposal of zero bonus for 2003, Gerrity did not engage in horse trading. Instead, he staked out a firm and immutable position based on his interpretation of the applicable law. He told Barall that "the 2003 bonus had nothing to do with Local 94." (Tr. 293.) Instead, he testified that he advised Barall that

> the bonus, as well as every other action that was being performed by the employees to date, was part of the status quo, and I didn't view that any different than medical [insurance] or breaks or supplying a meal or start times or anything else . . . . That promise was made by the Company to the employees, had nothing to do with the certification, **had nothing to do with negotiations**, whatever would happen as a result of negotiations would be a different issue, but they owe the employees what they said, that they promised them.

[44] Thoman recognized the commonplace intention that underlay the Company's proposal. In his testimony, he observed that "[w]hen you start your traditional negotiations, usually the two parties are far apart and then you negotiate toward the middle." (Tr. 644.) Interestingly, this nicely complements Iribe's testimony that when the Company proposed no bonus, "this was early in the discussions so that we knew we would probably come out at some point with a middle ground contract, and we needed to establish the other side of the negotiation." (Tr. 436-437.)

(Tr. 294. Emphasis added.)

It is evident that Gerrity's position was based on the Board's general rule regarding unilateral changes made during the course of collective bargaining. In *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enf. sub nom. *Master Window Cleaning, Inc. v. NLRB,* 15 F.3d 1087 (9th Cir. 1994), the Board held that, generally speaking, an employer who seeks a change in terms and conditions of employment has a "duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." Thus, as Gerrity asserted, during the bargaining process the Company could not impose changes in the status quo affecting such items as meal allowances or break times.

Unfortunately, Gerrity's position failed to recognize that the Board had carved out an exception to the *Bottom Line* rule with respect to issues involving "annually occurring events [that] could not await an impasse in overall negotiations." *Stone Container Corp.,* 313 NLRB 336 (1993). In such circumstances, the employer's obligation is limited to the provision of notice and an opportunity to bargain over the issue. See also *Alltel Kentucky, Inc.,* 326 NLRB 1350 (1998) (when, during bargaining for an initial contract, the employer notified the union that it would discontinue its annual pay increases, "[t]he Union's failure to request bargaining in the face of such notice defeats any claim that the Respondent unlawfully discontinued the January increase.") In light of the Board's holdings, Gerrity's position taken in response to the Company's July 9 proposal was legally incorrect.

Such was the state of the law at the time that Gerrity made his ill-fated decision to refuse to bargain with the Company regarding the 2003 bonus. It remains the state of the law. In a more recent power plant case involving the IBEW, *TXU Electric Co.,* 343 NLRB No. 132 (2004), the same issue was presented. In that case, during negotiations for an initial agreement, the employer notified the union that it did not plan to apply its preexisting annual wage increase plan to unit employees. The union failed to request bargaining about the matter. At the usual time, the employer granted an annual wage increase to nonunion staff, while withholding any increase for bargaining unit members. In finding that this conduct did not violate Section 8(a)(5), the Board observed that

> because the proposed change involved an annually occurring employment term, scheduled to recur in the midst of collective-bargaining, the bargaining standard of *Stone Container* applies rather than *Bottom Line.* By that standard, and in the context of a new collective-bargaining relationship, the Respondent's conduct was entirely consistent with good faith bargaining. It notified the Union of an upcoming annual recurring event and made a bargaining proposal to deal with it.[45]

343 NLRB No. 132, slip op. at 4.

Thus, it is clear that on July 9, 2003, the Company gave the Union timely notice of an annual recurring event that would likely take place during the parties' ongoing negotiations. It informed the Union that the Company proposed to alter its preexisting practice by declining to

[45] The Board, citing *Alltel Kentucky,* supra, also noted that "[h]aving been twice notified of the Respondent's decision not to adjust unit employees' wages in December, it was incumbent on the Union to request bargaining over that decision." 343 NLRB No. 132, slip op. at 3.

provide a 2003 bonus for bargaining unit members. This triggered the Union's obligation to request bargaining about the issue.[46] Far from making such a request, the Union specifically rejected any effort to bargain about the bonus.

In the remaining months of 2003, the Company repeatedly brought the issue to the Union's attention and offered to bargain about it. For example, on August 13, 2003, Barall told the Union's negotiators that he wished to make certain that the Union understood that the Company was proposing that it would not pay any 2003 bonus to bargaining unit members. Gerrity responded by again asserting his belief that the 2003 bonus was part of "existing conditions" and was not subject to bargaining. (R. Exh. 21, p. 6.) He clearly indicated that he viewed the payment of the 2003 bonus as an existing legal obligation of the employer. Indeed, he posed a rhetorical question underscoring his belief, "Do you want me to file a Board charge now?" (R. Exh. 21, p. 6.) A similar discussion took place on August 28. In a letter dated September 11, Barall again spelled out the Company's request that the parties bargain about the 2003 bonus. (R. Exh. 2.) Shortly thereafter, Gerrity responded verbally, telling Barall that "I am not playing that game with you." (GC Exh. 11, p. 1.)

With the onset of 2004, matters reached a critical stage. Management was faced with the need to make a final decision respecting the 2003 bonus for bargaining unit members. Each of the key management witnesses testified about the Company's rationale for deciding to prorate the bonus from July 9, 2003, the date on which the Company notified the Union that the issue existed and that the Company intended to deviate from past practice. Since this rationale is at the heart of the matter, I will quote each witness.

As one would expect, Barall, the director of labor relations, gave the most detailed explanation. He testified that he had concluded that the Company "had a right really to not pay the bonus for the whole year of 2003." (Tr. 896.) Nevertheless, he decided not to take this hard-line stance. As he put it,

> although we had a right to go back further, it really wouldn't be fair to the employees to not pay them a bonus for the whole year because it wasn't a subject that had been in bargaining until July, so for that reason we decided to inform the union that July 9th was the date we planned to prorate it.

(Tr. 896-897.) As to why he declined to defer to the Union's insistence that the bonus was not subject to negotiation, he offered this detailed explanation:

> It was extremely important from a labor relations viewpoint. I'm the company's chief negotiator. In my experience, its very important when you deal with unions that they understand that when you say something, you're serious, and when you ask them to bargain about a subject, that they have to bargain about, that they bargain with you. If I was to allow this union to simply say well, we're not going to talk to you, even though I had a right to do so, and then not take the appropriate legal action as a result, I would lose all credibility going forward in trying to reach agreements.

[46] The General Counsel agrees that the 2003 bonus payout was an event that falls within the Board's *Stone Container* rule requiring bargaining. (Tr. 866-867.)

(Tr. 897.) He went on to elaborate,

> I deal with ten unions around the country. If word got around that, you know, we took a position, the union wouldn't bargain with us, what would the other unions think, let alone this union. The minute you, as a chief negotiator, get the reputation of taking a position or bluffing and then backing down, you know, unnecessarily, you're not going to be very effective in this type of job.

(Tr. 899.) DiCarlo corroborated this account of Barall's reasoning. He testified that, at a management meeting, Barall explained that "this is what we need to do, we have to let the union know that we're serious and this is an important stand for us to take right here, that they can't refuse to bargain about this issue." (Tr. 1249.) Iribe also confirmed that this was Barall's thinking, reporting that during the strategy session Barall said, "[t]his was a good position to take with respect to those ongoing negotiations that would show the will of the company." (Tr. 445.)

In assessing whether this purported rationale for the decision to prorate the bonus represents management's actual thought processes or is merely a pretext, it is important to again consider the legal background as it forms a vital portion of the context.[47] In that regard, counsel for the Company cites *Double S Mining, Inc.,* 309 NLRB 1058 (1992). I agree that this precedent is strikingly similar to the circumstances confronted in this case by the Company's negotiators. Because of this, it is appropriate to discuss that case in some detail.

In *Double S Mining*, the parties were negotiating for an initial collective-bargaining agreement. The company had a preexisting practice of paying a Christmas bonus in the amount of $500. As the holiday approached, the company proposed a bonus payment of $300. The union's attorney responded by letter, asserting that "[a]s long as we are negotiating, you are legally forbidden to change terms and conditions of employment. Accordingly, you must pay the same bonus of $500.00 to the same employees as last year." 309 NLRB at 1060. The administrative law judge provided a pithy characterization of the union's position, observing that,

> [t]he Respondent was fully justified in construing [the union's attorney's] position for what it was; namely, that the employees had inherited a $500 Christmas bonus as a matter of right and it could not be removed by bargaining. The Union held firmly to the belief that the benefit was frozen by past practice to the same extent as if embedded in an existing collective-bargaining agreement. It was a posture born of mistake, but, at the same time, one that left no room for discussion. [Footnote omitted.]

309 NLRB at 1061. In a continuing parallel to the facts of this case, the company in *Double S Mining* stepped back from a position of full implementation of its original proposal. Instead of providing a $300 bonus, it actually gave the bargaining unit employees a $400 bonus.

On these facts, the General Counsel charged the company with a violation of Section

[47] I emphasize that what I am scrutinizing is only whether the Company actually employed this rationale for its decision. The Board clearly holds that it is inappropriate to assess the wisdom of the proffered rationale. See *Framan Mechanical, Inc.,* 343 NLRB No. 53, slip op. at 4-5 (2004), and the cases cited therein. (Crucial factor is not whether the employer's decision was good or bad, but whether it was honestly invoked and was, in fact, the cause of the adverse action.)

8(a)(5). The administrative law judge recommended dismissal of the complaint, finding that

> [o]n this record, it is apparent that all opportunity for agreement was preempted by the Union's mistaken belief that the entire subject was nonnegotiable, and its erroneous assumption that the employer was locked into last year's benefit level. Thus, having declared consciously and unambiguously that anything less would not be a fitting subject for bargaining, the Union, in effect, waived its interest in the subject matter. [Footnotes omitted.]

309 NLRB at 1062.

The Board, noting that "[t]he Respondent offered the Union an opportunity to negotiate about the amount, but the Union asserted that the amount, by law, was a term of employment which could not be changed," affirmed the judge's dismissal of the complaint. It observed that

> [w]e agree with the judge that it was the Union's intractable position on the Christmas bonus issue, and not a genuine impasse, which privileged the Respondent's unilateral payment of a $400 bonus to its employees—even though its last offer was for a bonus of $300.

309 NLRB at 1058. The existence of this legal background forms an important consideration in assessing the validity of the Company's claim that it formulated the decision to prorate the bonus based on legitimate considerations of law and negotiating strategy.

At the negotiating session on January 13, 2004, the Company notified the Union that it intended to prorate the bonus. It announced the actual implementation on March 12. In the intervening 2 months, the Union maintained its steadfast refusal to bargain about the subject. For example, at a session on January 27, Gerrity opined that "[y]ou owe it [the 2003 bonus] to them." (GC Exh. 24, p. 12.) An interesting exchange took place at another session on February 27. An employee member of the Union's negotiating team, Roberts, asked whether the proration of the bonus was, "a way to slam the guy[s] for voting union, why July 9?" (GC Exh. 27, p. 11.) As indicated in the Union's notes, Barall responded,

> [t]hat is when we started bargaining. The Union said, it wasn't to be negotiated, because it was good to the end of the year. We reviewed this internally and we think this is a negotiable thing.

(GC Exh. 27, p. 11.) It is apparent that, although the Company afforded the Union ample notice and made repeated solicitations to bargain about the 2003 bonus issue, the Union rejected any effort to engage the Company about the matter.

On this record, counsel for the General Counsel contends that the evidence shows that the Company's asserted rationale for proration, the Union's refusal to bargain about it, is a mere pretext designed to disguise an unlawful motive. As counsel puts it,

> [i]t has not been established that the Union actually refused to bargain *before* Respondent proposed a reduction or that the alleged refusal was Respondent's actual motivation for seeking a reduction, and Respondent still has not articulated a believable business rationale for proposing the cut. In these circumstances, the only plausible explanation for Respondent's proration proposal is that Respondent

> wanted to drive a wedge between the Union and the bargaining unit. [Emphasis in the original. Footnote and citation omitted.]

(GC Br., p. 57.)

I disagree with each of these assertions. The evidence overwhelmingly establishes that the Union had, in fact, flatly refused to bargain over the issue.[48] Furthermore, I find that the testimony of the management officials who made the decision for proration is consistent and credible. It is supported by the logic of Barall's explanation of his bargaining strategy when confronted by a union's refusal to engage in collective bargaining about a required topic. It is further bolstered by consideration of the Board's teachings regarding the permissible response to such a refusal to engage in bargaining. I find it noteworthy that the particular response selected by the Company mirrors the tactic approved by the Board in *Double S Mining,* supra. Indeed, this modulated response (that included a substantial unilateral improvement over the Company's initial proposed position regarding the bonus) supports a finding that unlawful animus was not a component of the decision making process. Lastly, I note that, far from being the "only plausible explanation" for the Company's action, the supposed plot to drive a wedge between the bargaining unit members and their representative is completely unsupported by evidence. It is constructed from mere conjecture and speculation.[49] As the Board recently observed in rejecting a finding of animus based on such conjecture and speculation,

> [a] mere suspicion of unlawful motivation for the [adverse actions] is not sufficient to constitute substantial evidence that the [actions] resulted from improper motives. [Footnote omitted.]

Neptco, Inc., 346 NLRB No. 6, slip op. at 2 (2005). In sum, I conclude that the Company's proffered explanation of its rationale for proration of the 2003 bonus is logical, consistent, and

---

[48] Elsewhere in his brief, counsel for the General Counsel notes that, at a bargaining session on August 13, 2003, in response to Barall's reminder that the Company was proposing no bonus for 2003, "Gerrity took the position, equally adamantly, that Respondent was obligated to pay, and should pay, a full bonus for 2003." (GC Br., p. 55.) Although counsel goes on to say that Gerrity was "merely *taking a position* that Respondent should pay the bonus, not refusing to bargain," this is just semantics. (Emphasis in the original.) (GC Br., p. 55.) An "adamant" assertion that the Company was "obligated" to pay is not a bargaining position. It is the opposite of a bargaining position—a flat refusal to discuss the matter further. On the next page of his brief, counsel recognizes as much, noting that, during a bargaining session several weeks later, Gerrity "indicated that he was not willing to discuss or bargain away the 2003 bonus and that he thought that the issue was not negotiable." (GC Br., p. 56.) This is an accurate description of the Union's position throughout the relevant period.

[49] If I were to indulge in similar conjecture and speculation, I would reach a different conclusion from that of counsel for the General Counsel. I would postulate that the Company may have proposed the proration date of July 9 to achieve a result roughly equal to its strongly held template for bonus programs in union represented facilities. The actual 2003 bonus paid to the bargaining unit members was almost identical to that owed to union employees at Cedar Bay and in New England under the formula contained in the collective-bargaining agreements in effect in those facilities. Indeed, by selecting the July 9 date, the Company actually paid a slightly higher bonus percentage to the Carneys Point employees. This is hardly suggestive of a desire to punish those employees for selecting union representation. However, I emphasize that I am not finding that this was the Company's actual motivation. Such a conclusion would be mere guesswork of the type that the Board properly prohibits.

credible. The General Counsel has not established that it was pretextual.

The General Counsel's next contention is that the Company has offered "shifting reasons" for the proration decision. (GC Br., p. 49.) If true, this would be probative evidence of unlawful motivation. *Black Entertainment Television,* 324 NLRB 1161 (1997). The General Counsel asserts that the Company first explained its decision by claiming that a bonus was inappropriate due to the restrictive nature of the Union's vision regarding their future relationship and the terms of any eventual collective-bargaining agreement. It is claimed that the Company subsequently shifted its position, asserting that the rationale for its action was the Union's refusal to bargain about the issue. As counsel put it, "Respondent realized that its original justification for opposing the 2003 bonus is untenable and it now contrives to justify its action on the Union's alleged bargaining behavior." (GC Br., p. 54.)

In my view, this conflates two different items of evidence. It is true that the Company has cited both of these rationales as forming part of its thinking. Thus, based on what it felt was the restrictive nature of the Union's bargaining positions, the Company decided to propose that there be no incentive bonus plan for 2003 or thereafter. It conveyed this rationale to the Union early in the negotiations. It is also accurate that the Company asserted at trial that the reason it prorated the 2003 bonus was the Union's steadfast refusal to negotiate about the issue. The problem with the General Counsel's argument is that it ignores the fact that these two negotiating positions were formulated in response to two different problems.

The Company has consistently contended that its rationale for the decision that is at issue in this case, the proration of the 2003 bonus payment, was based on the Union's refusal to bargain about the 2003 bonus. I have already found this contention to be credible and it does not represent any shifting of rationales. The Company first announced the proration to the Union on January 13, 2004. Union negotiator Thoman's notes of that meeting reflect that he was told that the Company was "willing to prorate [the 2003 bonus] from the time we notified the Union." (R. Exh. 16, p. 2; Tr. 666.) In his testimony Thoman confirmed that this was the Company's position. (Tr. 667-668.) Similarly, in the letter announcing the proration decision to the bargaining unit members on March 12, 2004, DiCarlo explained that the decision was based on, "the Union's continuing refusal to bargain regarding this subject." (GC Exh. 101.) I reject the claim that the Company has provided shifting rationales for its conduct. As counsel for the Company puts it,

> [i]t is not the least bit remarkable, let alone a sign of animus, that there were different reasons for the zero incentive proposal than for the implementation of a changed incentive. This happens <u>every single time</u> an employer exercises its rights under *Double S Mining*—the employer makes a proposal for one reason and then implements for a different reason, namely the Union's refusal to bargain. If this were evidence of animus, the *Double S Mining* doctrine would be a nullity. [Underlining in the original.]

(R. Br., p. 135.) The consistent rationale for the proration decision has been the Union's refusal to engage in required collective bargaining about the 2003 bonus.

The General Counsel next requests that I draw an adverse inference against the Company from the fact that it departed from "usual practice with respect to the bonus." (GC Br., pp. 49-50.) Departures from past practice are a form of disparate treatment that can form probative evidence of unlawful animus. *National Steel Supply, Inc.,* 344 NLRB No. 121 (2005), citing *W. F. Bolin Co. v. NLRB,* 70 F.3d 863, 871 (6th Cir. 1995). However, the key concept

here is that a departure from past practice must lack a satisfactory explanation in order to justify an inference of unlawful motivation.[50] In this case, the Company did depart from its past practice of using the same formula for calculation of the annual bonus for all Carneys Point employees.[51] However, I have already found that it had a persuasive explanation for this departure. The Union's stubborn refusal to bargain about the 2003 bonus constituted a satisfactory reason to depart from past practice. In particular, I credit Barall's testimony that the Union's intransigence required a strong management response in order to preserve management's credibility in negotiations and to effectuate management's overall negotiating strategy. The Company's decision to prorate the bonus from the date it provided the Union with notice of the issue serves to underscore this point. The Company did not engage in an unexplained alteration of its past conduct and I decline to draw any adverse inference against it on this basis.

Counsel for the General Counsel's next argument appears to be a request that I draw an inference of animus from the fact that the Company faced "the threat of further union organization." (GC Br., p. 50.) In particular, counsel suggests that the Company was motivated to discriminate against the Union at Carneys Point in order to deter organizational efforts at its nearby Logan facility. Such an inference may be probative if it forms a piece of a larger mosaic of evidence of animus. Here, standing alone, it is merely another form of conjecture or speculation of the type that the Board has always rejected. See, for example, *Lasell Junior College*, 230 NLRB 1076 at fn. 1 (1977) ("mere suspicion cannot substitute for proof of an unfair labor practice"), as well as, *Neptco, Inc.,* 346 NLRB No. 6, slip op. at 2 (2005) ("mere suspicion of unlawful motivation . . . is not sufficient to constitute substantial evidence").

Finally, the General Counsel cites the fact that the Company placed "the blame for the reduction . . . at the feet of the Union." (GC Br., p. 50.) The Company's communication to the bargaining unit members informed them that the 2003 bonus was "legally subject to negotiations." (GC Exh. 101.) It went on to explain that "the Company told the Union that we wanted to negotiate regarding the year 2003 Incentive Plan." (GC Exh. 101.) However, "[c]onfronted with the Union's continuing refusal to bargain regarding this subject," the Company was prorating the bonus to July 9. (GC Exh. 101.) These statements regarding the legal background and the Union's behavior were accurate. The Company's communications did not contain any "threat of reprisal or force or promise of benefit." As a result, they were consistent with Section 8(c) of the Act's protection of freedom of expression. In addition, I conclude from the totality of the evidence that the Company's communication of the linkage between the proration decision and the Union's refusal to bargain was a truthful explanation of the underlying decision. I decline to infer any unlawful animus from this accurate communication.

I have carefully considered each indicia of unlawful animus proffered by counsel for the General Counsel. The direct evidence of animus, consisting entirely of the assertions made by Talbot, has been discredited as unreliable. The circumstantial evidence, considered singly and in combination, does not withstand examination given the impressive evidence of the

---

[50] In this regard, it is instructive to compare the Board's analysis in two relatively recent cases, *Toll Mfg.,* 341 NLRB 832, 833-834 (2004), where the Board found evidence of animus in the departure from past practice involving disciplinary procedures, with *K-Mart Corp.,* 341 NLRB 702, 704 (2004), where the Board reversed a finding of disparate treatment because the employer satisfactorily explained its actions.

[51] On the other hand, I have already noted that the result of the proration decision was to treat the represented employees at Carneys Point substantially the same as its represented employees at Cedar Bay and in New England.

Company's actual decision making process. That evidence, consisting of consistent and credible testimony from the key actors, inferences to be drawn from the situation confronting those management officials, and consideration of the factual and legal background, persuades me that the Company's actual motivation for the proration of the bonus was as a response to the Union's refusal to negotiate through a demonstration that the Company would not back down in the face of such conduct. I find that the proration decision was not designed or intended as unlawful discrimination against the bargaining unit members arising from their participation in protected activities.

In reaching this ultimate conclusion, I have paid particular attention to the Board's teachings expressed in a previously mentioned case involving a very similar set of circumstances, *Sun Transport, Inc.,* 340 NLRB 70 (2003). As in this case, the General Counsel alleged a violation of Section 8(a)(3), but did not allege that the conduct at issue violated Section 8(a)(5). In *Sun Transport,* the parties had been in negotiations for a successor collective-bargaining agreement. At the same time, they were addressing the issue of severance pay, a matter of pressing concern as the company was planning to divest the operations that employed the bargaining unit members. The company proposed that union members receive only half the severance pay offered to unrepresented employees. As its rationale, the company indicated that the union had not been cooperative in efforts to reduce operating expenses so as to avoid the need for divestiture. Furthermore, unit members had declined job offers that would have reduced the amount of severance pay required. The union rejected the proposal for severance pay at half the rate of unrepresented employees. No agreement was ever reached. Ultimately, the laid off bargaining unit members received no severance pay at all.

The Board reversed the judge's conclusion that the company's actions had been unlawfully motivated by discriminatory intent. In outlining its rationale, the Board expressed views about the collective-bargaining process that speak directly to the resolution of the issues presented in this case. It held,

> the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive. Although an employer is not free to discriminatorily afford represented employees less benefits than unrepresented employees, i.e., in order to discourage support for the union, the record does not establish that the Respondent engaged in such conduct here . . . .
>
> The Respondent sought to use the severance pay issue to force concessions in other areas. More particularly, the Respondent . . . was tying its position on severance to the Union's refusal "during the entire period" (i.e., during the negotiations in 1996 and 1997 for a successor collective-bargaining agreement) to make concessions in other areas.
>
> There is no evidence, or even an allegation, that the Respondent's bargaining was in bad faith. Indeed, all of this was a legitimate part of the bargaining process. As the Board and the courts have recognized, "[c]ollective bargaining by its very nature is an 'annealing process hammered out under the most severe and competing forces and counter-acting pressures.'" [Citations omitted.] The Respondent's severance offer was but one element of the "competing forces and

> counteracting pressures" inherent in the collective-bargaining process. Consequently, the Respondent's consideration of the Union's bargaining positions [in formulating its severance pay proposal] does not demonstrate antiunion animus.
>
> We recognize that the Respondent ultimately made no severance payment to these employees. However, there is no allegation that the Respondent violated Section 8(a)(5) by taking action that was different from its bargaining position. Further, as with the severance offer, the ultimate lack of a severance payment demonstrates nothing more than the Respondent's attempt to offset the lack of savings in other areas. Thus, just as the Respondent could offer reduced severance pay as a means of inducing concessions, so the Respondent could withhold any severance pay to achieve cost savings . . . .
>
> For the foregoing reasons, we find the General Counsel failed to establish that the Respondent was motivated by antiunion animus in offering less severance pay to employees represented by the Union than to unrepresented employees. Accordingly, we find that the Respondent did not violate Section 8(a)(3) of the Act as alleged. [Footnotes omitted.]

340 NLRB at 73-74.

In the case before me, the parties engaged in hardheaded and tough nosed bargaining. To follow through with the Board's metallurgical analogy, they went at each other with hammer and tongs. For instance, at the very first bargaining session, the Union's chief negotiator chided the management team members for having "killed" an employee who died subsequent to his layoff. (Tr. 1236.) While the talks were often quite professional, there were also significant interludes marked by sarcasm, bitterness, and accusations. None of this was particularly unusual or untoward.[52] Furthermore, unlike the union in *Sun Transport*, Local 94 elected to take a bargaining position inconsistent with the Board's articulation of the legal requirements for bargaining regarding an annually recurring event scheduled to take place during the parties' negotiations for an agreement. Within this context, I simply cannot draw an inference of unlawful animus from the Company's bargaining positions, either on the subject of the 2003 bonus or otherwise.

As a result, I conclude that the General Counsel has failed to meet his initial burden of demonstrating that the proration decision was substantially motivated by unlawful discriminatory intent.[53]

---

[52] Indeed, the Seventh Circuit has observed that the Act "models labor relations as tests of strength," calling this a "combat" model. *Trompler, Inc. v. NLRB,* 338 F.3d 747, 750 (7th Cir. 2003).

[53] In the interest of decisional completeness, I note that in rejecting the claim that the Company's proffered explanation was a pretext, it follows that, at the ultimate step in the *Wright Line* analysis, I would have concluded that the Company had met its burden of demonstrating that it would have taken the same proration decision regardless of any animus because that decision was an essential component of its legitimate negotiating strategy in response to the Union's refusal to bargain about the 2003 bonus.

B. The Remaining Alleged Violations of the Act

The General Counsel alleges that the Company also committed two violations of Section 8(a)(5) of the Act. The first of these concerns the Company's decision to prorate the 2003 bonus. Counsel for the General Counsel explains the nature of this alleged violation as follows:

> Here, Respondent's proposed reduction of the 2003 bonus was discriminatorily motivated and in violation of 8(a)(3), Accordingly, under *International Paper*, Respondent violated 8(a)(5) when it implemented the proposal unilaterally.[54]

(GC Br., p. 61.) This line of reasoning is consistent with the language in the complaint, noting that the claimed violation of Section 8(a)(5) arises from the Company having allegedly "derivatively" failed and refused to engage in collective bargaining. (GC Exh. 1(r), par. 9.) This was explained further in counsel for the General Counsel's opening statement:

> We are not alleging that the employer refused to bargain about its proposal but we are alleging that, notwithstanding that, it was still an 8(a)(5) violation because there was a proposal that was discriminatorily motivated, that's why [it's] an 8(a)(5) as well. It's not your run-of-the-mill 8(a)(5) allegation.

(Tr. 16-17.)[55]

It is evident from the foregoing that this asserted violation of Section 8(a)(5) hinges entirely on a finding that the Company's proration decision was unlawfully discriminatory within the meaning of Section 8(a)(3). As I have concluded that this was not the case, there is no evidence to support the alleged derivative violation of Section 8(a)(5).

The General Counsel's final allegation against the Company is also dependent upon and derivative of a finding of a violation of Section 8(a)(3). It is asserted that the Company's implementation of the terms of its final offer in September 2004 was unlawful because,

> [a]lthough an employer that has bargained in good faith to impasse may implement the terms of its final offer, it is not privileged to implement if the impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations. [Citations omitted.]

(GC Br., p. 62.)

Once again, counsel's position in his brief is consistent with the nature of the complaint allegations. The complaint asserts that the September implementation violated Section 8(a)(5) because it was made without a prior rescission of the "discriminatory" reduction of the 2003 bonus, a context that tainted the bargaining process within the meaning of *Lafayette Grinding Corp.,* 337 NLRB 832 (2002). (GC Exh. 1(r), par. 7(c).)

---

[54] The citation for *International Paper Co.,* is 319 NLRB 1253 (1995), enf. denied 115 F.3d 1045 (DC Cir. 1997).

[55] See also counsel for the General Counsel's similar representations at Tr. 17-18.

Having concluded that the bargaining context was not tainted by any unfair labor practices committed by the Company, this alleged violation fails. I agree with the Company's contention that the September implementation was privileged by the Union's abandonment of the bargaining process. As the Company puts it,

> [h]aving wrongfully cancelled bargaining, and having shown no sign of returning to the table, the Union's conduct brought it squarely within the rule enunciated by the Board in *Double S Mining.*[56]

(R. Br., p. 151.)

At the time that the Company implemented its final offer in September, the record clearly establishes that the Union had unilaterally canceled bargaining talks. As a result, it waived any objection to implementation of the Company's offer. See *Double S Mining*, supra, as well as, *WWOR-TV*, 330 NLRB 1265 (2000). In sum, the Company did not violate Section 8(a)(5) of the Act when it implemented its changed terms and conditions of employment.

C. The Allegation Against the Party in Interest

It will be recalled that, on January 31, 2005, the Party in Interest, North American Energy Services, entered into an agreement with Power Services Company to take over the operations of the Carneys Point facility that involved the work of the bargaining unit. The Party in Interest proceeded to recognize the Union, negotiate with it, and eventually enter into a collective-bargaining agreement.

The General Counsel contends that the Party in Interest, having had knowledge of controversy involving Power Services at the time it took over these operations, became a successor to Power Services within the meaning of *Golden State Bottling Co. v. NLRB*, 414 U.S. 188 (1973). As a result, it became liable to remedy the alleged unfair labor practices committed by its predecessor. The Party in Interest contends that, while it is a successor within the meaning of *NLRB v. Burns Security Services,* 406 U.S. 272 (1972), it is not a *Golden State* successor. (Party in Interest's Br., pp. 20-23.)

Having concluded that the Party in Interest's predecessor did not commit any of the unfair labor practices alleged in the complaint, I need not resolve this issue. There is nothing for the Party in Interest to remedy.

Conclusions of Law

1. The Respondent, Power Services Company, did not violate the Act in any of the ways alleged by the General Counsel in the consolidated complaint and notice of hearing dated May 10, 2005.

2. The Party in Interest, North American Energy Services, is not liable to remedy any of the alleged unfair labor practices as described in the consolidated complaint and notice of hearing dated May 10, 2005, and the amendments to the consolidated complaint dated July 12, 2005.

---

[56] The citation for *Double S Mining, Inc.,* is 309 NLRB 1058 (1992).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[57]

ORDER

The consolidated complaint and its amendments are dismissed.

Dated, Washington, D.C. March 17, 2006

Paul Buxbaum
Administrative Law Judge

[57] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.